S. Hrg. 100-220

CONSTRUCTION INDUSTRY LABOR LAW AMENDMENTS OF 1987

HEARING

BEFORE THE

SUBCOMMITTEE ON LABOR

OF THE

COMMITTEE ON
LABOR AND HUMAN RESOURCES
UNITED STATES SENATE

ONE HUNDREDTH CONGRESS

FIRST SESSION

ON

S. 492

TO AMEND THE NATIONAL LABOR RELATIONS ACT TO INCREASE THE STABILITY OF COLLECTIVE BARGAINING IN THE BUILDING AND CONSTRUCTION INDUSTRY

JUNE 4, 1987

Printed for the use of the Committee on Labor and Human Resources

U.S. GOVERNMENT PRINTING OFFICE
77-107 WASHINGTON : 1987

For sale by the Superintendent of Documents, Congressional Sales Office
U.S. Government Printing Office, Washington, DC 20402

S541-46

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CONSTRUCTION INDUSTRY LABOR LAW AMENDMENTS OF 1987

THURSDAY, JUNE 4, 1987

U.S. Senate,
Subcommittee on Labor,
Committee on Labor and Human Resources,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:41 a.m., in room SD-430, Dirksen Senate Office Building, Senator Howard M. Metzenbaum (chairman of the subcommittee) presiding.

Present: Senators Metzenbaum, Kennedy, Hatch, Quayle, Stafford, Humphrey, Matsunaga, and Harkin.

OPENING STATEMENT OF SENATOR METZENBAUM

Senator Metzenbaum. The Subcommittee will come to order.

Today's hearing addresses S. 492, the Construction Industry Labor Law Amendments of 1987. This legislation is needed to restore the special construction industry labor relations provisions of the National Labor Relations Act. Congress enacted those provisions in 1959 to take proper account of the unique circumstances of the construction industry.

Unlike the steel or auto industries, the construction industry is characterized by constantly shifting job sites and a transitory employee population. Congress in 1959 recognized the unique aspects of construction by amending the National Labor Relations Act to allow construction unions to enter into pre-hire agreements. But Congress did not foresee that employers could successfully negate these agreements by engaging in what amounts to a corporate shell game.

Double-breasting is the practice whereby a construction company with an established collective bargaining agreement sets up a separate corporate entity that engages in the same type of work using non-union employees. By shifting the work over time to the non-union company, an employer can render meaningless the union contract into which it entered.

Due to decisions of the National Labor Relations Board and the Federal courts, employers in the construction industry are not bound by their commitments to engage in collective bargaining. To my knowledge, there is no other area of law in which an individual is allowed to enter a contract and simply abandon its obligations. S. 492 is intended to assure that both parties in the construction industry are bound by their commitments to engage in collective bargaining.

Our laws already provide for truth in advertising and truth in lending. The purpose of this bill is to ensure truth in bargaining. In the construction industry, as in other areas of American life, when you give your word you must keep your word.

The bill makes clear that in the construction industry, any two business entities that engage in the same or similar work with common ownership, management or control are a single employer, and, secondly, that an employer's pre-hire agreement applies to all other business entities comprising the single employer within the geographic area covered by the agreement.

I believe this is a needed piece of legislation. It protects the interests of working men and women, and it protects the integrity of the collective bargaining process.

Finally, I know that this bill is a controversial one, and that both sides have strong feelings. I hope that we can consider the legislation on its merits, and address specific concerns or criticisms in a cooperative, bipartisan spirit at the Committee level.

Senator Kennedy, do you have an opening statement?

Senator Kennedy, I was not sure of the protocol. I turn to Senator Quayle first, as the ranking minority member, and I apologize to you, Senator Quayle.

Senator QUAYLE. That is quite all right, Mr. Chairman. I am used to that.

Senator METZENBAUM. No, you are not. [Laughter.]

Senator QUAYLE. I will tell you what, I will forgive you today because today is a very monumental day in Senator Metzenbaum's life and it is something that we understand, that perhaps you might forget that you are supposed to call on the ranking member of the Subcommittee, but in the spirit of bipartisanship I would like to wish you a happy 70th birthday.

Senator METZENBAUM. Thank you very much.

[Applause.]

Senator QUAYLE. I was told this morning that it was going to be Senator Metzenbaum's 70th birthday and he and I have been going back and forth on this occupational disease notification and I was thinking of perhaps a little bit different amendment, instead of what is concerned there about sending notices out to people that might incur additional risks of getting disease, that perhaps in honor of your 70th birthday that we ought to send notices out to prospective Senate candidates and just point out how good the United States Senate is for one's health. You do not look 70.

Senator METZENBAUM. I do not feel 70. I feel great. I do not find there are any occupational hazards here either.

Senator QUAYLE. No occupational hazards.

Senator HATCH. He acts 70, though, I will tell you. He acts 70. He is as crotchety as any Senator we ever had. [Laughter.]

Senator METZENBAUM. It takes one to know one. [Laughter.]

Senator HATCH. At least I do not have the onslaught of Alzheimer's. [Laughter.]

I was wondering why you were so strongly in support of that bill along with me. I have been losing most of my memory lately, too.

Senator METZENBAUM. Senator Hatch, I draw the line now. I will not joke about that.

Senator HATCH. All right, I will not either.

Senator METZENBAUM. Okay.

Senator QUAYLE. I do want to share, you know, you have always been—you mentioned the last time I quoted Milton. You said, oh, you are quoting Milton. Well, I have got another Milton quote for you on your birthday, and I do not want you to forget this one. This is sort of in support of my occupational disease amendment that is good for your health:

"Old experience does attain to something like prophetic strain."

Senator Metzenbaum, now we get to move to what——

Senator METZENBAUM. Now I know why they talk about him being the Robert Redford of the Senate. [Laughter.]

Senator QUAYLE. No, no. On my birthday, you can talk about that but not on yours.

Now, let me get to something that is less controversial than Senator Metzenbaum's birthday, and that is S. 492. Basically, I look at this legislation, and a number of things come to mind.

First of all, you have got to look at the employee freedom of choice which has been a principal tenet of our labor laws for decades. S. 492 I think would eliminate that freedom of choice and put in its place mandatory union membership for many construction workers. It is not a narrowly drawn bill, as the proponents of the bill have stated. It is very broad in scope and potentially very inclusive.

The argument that we constantly hear is that the anti-double-breasting legislation is necessary to prevent employers from evading their collective bargaining responsibility. That is just simple hogwash. Current contractual provisions are enforceable, both through the NLRB proceedings and through arbitration. Double-breasting is not an invasion of collective bargaining. It is a response, an entirely legal and legitimate to a collective bargaining relationship.

The testimony to be presented today by CBI Industries, which I had the opportunity to read, dramatizes this point better than I. S. 492 would establish a Federal standard to supplant what is currently available through free collective bargaining and enforced through the NLRB and the courts. Currently, the decision to organize must be made by the workers themselves and not by the Federal Government. S. 492 would sharpen the adversarial relationship between labor and management by making unionization mandatory for all double-breasted operations, and upsetting the balance in our Nation's labor laws. This is exactly what is not needed in today's work place.

The effect of the bill would not be to prevent evasion of the collective bargaining agreement but, instead, to reinterpret it and expand the collective bargaining agreement to include entities that were never contemplated to be covered by the employer or the union.

Under current law, in the *Manganaro Corporation of Maryland* case, unions may include anti-dual shop provisions in their collective bargaining agreements. For example, collective bargaining agreements signed by the Boston District Council of Carpenters provides not only that it shall be between the unions and employers that assent thereto, but also provides that "if and when the employer shall perform any work of the type covered by this agreement under its own name and under the name of another, and wherein the employer has either directly or indirectly, a significant degree of ownership, management, or control, the terms of this agreement shall be applicable to all such work."

Now, this is a collective bargaining provision. In fact, it is something that can be achieved. That contractual clause which is available to all who are willing to bargain for it, is essentially the same as would be imposed by law under this anti-double-breasting bill. So this is achievable and can be gotten through the collective bargaining process. Proponents of S.492 are now coming to the Congress and asking for their support.

Therefore, Mr. Chairman, I do think that we will have a good hearing today, we will probably hear a divergence of opinion. I think we will listen to it very, very carefully and decide on how we are going to proceed.

I ask unanimous consent that the rest of my statement be inserted in the record as if given.

Senator METZENBAUM. Without objection, it is so ordered.

[The prepared statement of Senator Quayle follows:]

Senator Dan Quayle

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OPENING STATEMENT OF U.S. SENATOR DAN QUAYLE (R-IN)
AT THE SENATE LABOR AND HUMAN RESOURCES SUBCOMMITTEE ON LABOR HEARING
ON S. 492,
THE CONSTRUCTION INDUSTRY LABOR LAW AMENDMENTS OF 1987
June 4, 1987

Employee freedom of choice has been a principal tenet of our labor laws for decades. S. 492 would eliminate that freedom of choice and put in its place mandatory union membership for many construction workers. It is not a narrowly drawn bill, as proponents of the bill have stated. It is very broad in scope, and potentially very inclusive.

The argument that we constantly hear is that anti-double-breasting legislation is necessary to prevent employers from evading their collective-bargaining responsibilities. That is hogwash. Current contractual provisions are enforceable both through the National Labor Relations Board (NLRB) proceedings and through arbitration. Double-breasting is not an evasion of collective bargaining. It is a response -- entirely legal and legitimate -- to a collective-bargaining relationship. The testimony to be presented today by CBI Industries, Inc. dramatizes this point better than I can.

S. 492 would establish a federal standard to supplant what is currently available through free collective bargaining and enforced through the NLRB and the courts. Currently, the decision to organize must be made by the workers themselves, and not by the federal government. S. 492 would sharpen the adversarial relationship between labor and management by making unionization mandatory for all double-breasted operations and upsetting the balance in our nation's labor laws. This is exactly what is not needed in today's workplace.

The effect of the bill would not be to prevent evasion of the collective-bargaining agreement, but instead to reinterpret it and expand the collective-bargaining agreement to include entities that were never contemplated to be covered by the employer, or the union.

Under current law -- in Manganaro Corporation, Maryland (JD--313--86) -- unions may include anti-dual-shop provisions in their collective-bargaining agreements. For example, the collective-bargaining agreement signed by the Boston District Council of Carpenters provides not only that it shall be between the unions and employers who assent thereto, but also provides that ... "if and when the employers shall ... perform any work of the type covered by this agreement, under its own name or under the name of another ... wherein the employer has either directly or indirectly, a significant degree of ownership, management or control, the Terms of this Agreement shall be applicable to all such work."

That contractual clause, which is available to all who are willing to bargain for it, is essentially the same as would be imposed by law under this anti-double-breasting bill.

A second part of S. 492 would prohibit a unilateral repudiation of a pre-hire agreement. A pre-hire agreement, unique to the building and construction industry, is one by which an employer and a union enter into a collective-bargaining agreement although the employees to

[MORE]

be hired have not had the opportunity to select or reject the union as their bargaining representative. In its recent Deklewa decision, the NLRB held that pre-hire agreements cannot be unilaterally terminated during the term of the agreement.

However, unlike this legislation, which would permit the union to enjoy a presumption of majority status, the NLRB held that employees covered by a pre-hire agreement would have a right to decide, through an NLRB-conducted election, whether they wish to continue to be represented by a union. This right to an election could be exercised by the employees at any time during the term of the pre-hire agreement, or upon its expiration. Thus, individual employee rights are protected by the NLRB ruling.

Anti-dual-shop clauses are a legitimate part of collective bargaining. I think we should preserve that as an option and reject this bill, which makes legitimate dual shops illegal.

###

Senator METZENBAUM. Senator Kennedy?

OPENING STATEMENT OF SENATOR KENNEDY

Senator KENNEDY. Thank you, Mr. Chairman.

I welcome the fact that we are having these hearings this morning. I want to point out that perhaps an encouraging sign is that ranking minority member, the Senator from Utah, has a double-breasted suit on this morning and perhaps that augers well for the future. [Laughter.]

Seriously, Mr. Chairman, I would like to put my complete statement in the record.

I want to say how much I appreciate the fact that Bob Georgine will be testifying this morning and be able to address some of the very legitimate concerns of the members of the building trades. We are going to hear distortions, misrepresentations about this legislation. We just heard it.

This is not about employee democracy. When you listen to the criticisms like the ones that have been just uttered, those issues were addressed in 1959. 8(f) Section of the NLRA is the provision which provides for these agreements which are unique in terms of the building and the construction industry. And if individuals of this Committee or the Senate have criticisms about various words and about the expansion of various provisions, let them work with us in terms of trying to define those provisions. And our good friend from Indiana does that on many pieces of legislation in a very constructive way.

But there are those on this Committee now that are kind of laying down the gauntlet on this one, and it is wrong, Mr. Chairman. You know it and I know it. When the employers and employees make an agreement covering a local area or a particular construction site, an agreement about various kinds of conditions and then set up another corporate shell to do exactly the same kind of work, circumventing their word and their agreement after a very studied kind of way of circumventing the existing contract, that is wrong. That is unfair.

We are attempting in this legislation to address what is a growing identifiable problem, and this legislation is narrow in scope. For critics to claim this means if they agree to one local agreement, it applies all over the country to every possible kind of work—that is wrong and that is hogwash. If you want to know the definition of hogwash, that is hogwash.

So I hope, Mr. Chairman, that we are going to be able to be serious about this issue. I do not doubt that there is confusion among many of our members. There is confusion in the public about what we are attempting to do. There is an identifiable problem and everyone in this room, those that support the legislation and those that are opposed to it know it, and are attempting to deal with it.

I must commend the House, Congressman Clay and others, for trying to deal with some of these misrepresentations and distortions. I think they made a very constructive effort in the House of Representatives. I had hoped we might be able to know that that is not our particular measure that we are considering today, but it does seem to me that the Clay approach narrows the scope and by way of definition and clarification, which is important and which I support.

So I look forward to these hearings. I hope they are something more than the gross misrepresentations and the distortions about what this bill does not do. I think we all know what the problem is, we all know what the needs are, we all know the patterns which have grown up in recent times. I am very hopeful that we can address this issue and this question with this legislation. I am very hopeful it can be bipartisan.

We have worked together in a number of different areas in this Committee in a bipartisan way, and I hope we can reach some solution to a problem which is really affecting in a very significant and important way the kind of opportunities for workers in the construction industry, their well-being, and their livelihood, and we should not treat this issue lightly. I look forward to working with the Senator from Ohio in fashioning such a legislative remedy.

I would ask unanimous consent that I may include my statement in the record.

Senator **METZENBAUM**. Without objection, it is so ordered and we appreciate your strong statement of support.

[The prepared statement of Senator Kennedy follows:]

PREPARED STATEMENT OF SENATOR KENNEDY

Senator **KENNEDY**. Thank you Senator **METZENBAUM** for asking me to be here for the Senate Labor Subcommittee hearing on consideration of S. 492, the "Construction Industry Labor Law Amendments of 1987". I introduced this legislation on February 5th of this year along with Senators D'AMATO, BRADLEY, and WEICKER. The bill we have before us is identical to the bill which passed out of the House by a 56 vote margin in the 99th Congress. Mr. Chairman, as you know, we now have 10 cosponsors of this legislation from among the membership of the full Labor and Human Resources Committee.

I also want to take this opportunity to thank Bob Georgine, President of the Building and Construction Trades Union, and Mr. Arthur Rosenfeld of the Department of Labor for testifying before the subcommittee today. Mr. Georgine has spend a lifetime attempting to improve the lives of working men and women in the building and construction trades, and we certainly will benefit by his testimony before the subcommittee.

This legislation has been introduced out of concern over existing employment practices which have sapped the vitality of the special construction industry amendments, which were added to the National Labor Relations Act in 1959. These amendments were passed after universal recognition of the unique characteristics of the building and construction industry, in relation to our Nation's labor laws.

Unfortunately, over the years, these necessary provisions for the construction workers have effectively been dismantled by the use of crafty corporate shell games. Employers have learned, and actually studied, how to successfully avoid their existing obligations under current collective bargaining agreements with these tactics.

The system, for whatever reasons, is unable to effectively monitor these abuses, and therefore the abuses have increased in alarming numbers.

Simply, this legislation seeks to bind employers to agreements they have entered into voluntarily with employees or their representatives. Upholding the letter of the law in an employment contract is what this bill is about.

Before proceeding further on S. 492, I think it would be very appropriate for us to first carefully consider the action that has been taken to date in the House of Representatives on this issue. While we are just now getting our first chance to carefully debate and consider this legislation, our counterparts on the House Education and Labor Committee have had the issue before them on numerous occasions.

In the last Congress they held Subcommittee and Committee hearings and markups, passed the bill out to the floor. There, it was thoroughly debated and ultimately passed by a healthy margin. In this Congress they have again had a hearing and 2 mark up sessions. Just a few weeks ago the bill was once again passed out of that Committee and will soon be brought up on the House floor.

The critical element in this history of the "double breasting" bill, is the fact that the authors of the legislation, especially Labor-Management Subcommittee Chairman Bill Clay, made significant compromises and clarifications in the language of the bill in the 100th Congress markups. They did this. despite the strong support they had with the original bill in the 99th Congress. They did this in response to what they saw as concerns over potential ambiguities in the original bill.

I strongly favor the approach that was taken in the House Education and Labor Committee, and I support the changes which have been made in H.R. 281. These changes have been made to lay to rest the misconceptions and distortions which have constantly surrounded the intent of this legislation.

The intent of S. 492 is the same as it has always been, to restrict and make illegal, specific "double breasted" operations within the construction industry, and to make pre-hire collective bargaining agreements as effective, and equally binding, as those made in other industries.

S. 492 is not a common situs picketing bill. S. 492 has never been intended as a common situs picketing bill. The bill does not bring contractors and subcontractors under an umbrella of single employer status for picketing purposes. Congressman Clay's substitute amendment has specifically addressed this concern with explicit language which should allay all fears of common situs picketing.

The amended House version adds the word substantial before "common management and common control," as well as common ownership, in describing the single employer test. This addition was made to relieve the concern that only a small degree of commonality, between 2 or more business interests, could lead to single employer status.

Another of the widespread myths about this bill is that it will reach beyond the building and construction industry. The bill could hardly be clearer in this regard. Even so, the House Committee saw fit to further clarify the language. The language is crystal clear—this legislation does not go beyond building and construction contractors.

There have been other changes as well, some technical and others addressing legitimate concerns. The House has shown a willingness to work with those who have concerns, and I want everyone to know that I share that view. I will not, however, have time to quibble with those who insist on distorting the intent of this bill as a dilatory tactic.

Chairman Clay in the House has done much to clarify his bill, and Chairman Metzenbaum, I hope we can work together on crafting a similar substitute for consideration in the Senate.

This bill is designed to restore integrity, honesty, and fairness in the building and construction industry.

The unique particularities of the construction industry which were addressed in the Landrum-Griffin Act amendments of 1959 have not changed. Congress must act to maintain the stability and fairness of labor-management relations in this industry. I am committed to see the restoration of that stability and fairness through the passage of S. 492 or the appropriate substitute.

Senator METZENBAUM. Senator Hatch?

OPENING STATEMENT OF SENATOR HATCH

Senator HATCH. Thank you, Mr. Chairman.

I would like to congratulate you also on your 70th birthday. I want you to know that over these last eleven years I do not know of a Senator that I have enjoyed more and have disagreed with more over than you. Nevertheless, I have a greater personal relationship with you and I have a lot of respect for you.

Senator METZENBAUM. Thank you.

Senator HATCH. You have a high degree of intelligence and you are indefatigable. You make a lot of the younger people around here look like real pikers when it comes to work, and I know more about that than anybody because I am constantly trying to clean up after you. [Laughter.]

It should not come as a surprise to anyone that the Chairman of the Committee, the distinguished Chairman, Senator Kennedy, the Chairman of this Subcommittee, Senator Metzenbaum, and I, and I think Senator Quayle, do not see eye to eye on S. 492, the Construction Labor Law Amendments of 1987.

I think we disagree on the proper interpretation of the bill, its purpose and its probable effect, and I think you probably gathered that from Senator Kennedy's interesting remarks. But I do believe that we agree that today's hearings represent a sincere, fair attempt to apprise the Committee of the different views of this very difficult piece of legislation.

I understand that Senator Metzenbaum and Senator Quayle agreed to the basic format of this hearing and both have done their best to select a representative sample of the numerous individuals and organizations that have indicated an interest in presenting testimony with regard to this bill.

Senator Metzenbaum, I know that you and your staff have worked hard to balance a variety of competing interests, including my own last minute request, and I thank and commend you and your staff for the fair selection of witnesses and the courtesy that you have shown to us.

Now, I may be the only member of this Committee, and I believe I am, who was raised in the trade union movement, who literally worked for ten years in the building and construction industries with my bare hands and I am very proud of it. I actually went through an apprenticeship and became a journeyman.

So I am concerned about this type of legislation, as all of my colleagues are, but I am concerned about it from a firsthand standpoint and from a free enterprise standpoint. And, I regret that S. 492 is not as fair as the process that created the fairness of this hearing.

The alleged purpose of the bill is to outlaw runaway shops, that is, employers who set up sham organizations to avoid their collective bargaining responsibilities. But I think my colleagues might already know that those operations are already illegal under the law. We are not necessarily correcting that. That is already corrected by the law.

The real purpose of this bill is to eliminate dual-shop construction companies in the United States, regardless of whether they are operated in accordance with the law as established by the Supreme Court and the Congress and that as has been enforced by the National Labor Relations Board during both Democratic and Republican administrations.

The bill is also designed to ensure that if an employer signs a pre-hire agreement, that employer cannot then unilaterally repudiate that agreement at the convenience of the employers. But that is current law as established by the *John Deklewa & Sons* case. There, the NLRB held that an employer who has entered into a pre-hire agreement may not unilaterally repudiate that agreement before its expiration date, unless the employees vote in official NLRB elections to get rid of or change their bargaining representative.

The Board also held that at the expiration of the agreement the union is not presumed to have majority status and must prove majority support before it can strike or picket the employer. Now, that is an important decision, important law. It provides a lot of protections to both sides. It is fair both ways. It is not one-sided. It protects the unions and it protects the companies.

S. 492, however, goes much further, and this is not some small insignificant point. It would make pre-hire agreements binding beyond their expiration date, beyond the agreement the two parties have. It would give these agreements the same status as a collective bargaining agreement.

But perhaps the most discouraging feature of this bill is its treatment of the more than 100,000 open-shop employees of dual-shop operations in the construction industry. If passed, the bill would require by law that the collective bargaining agreement covering the union side of a dual-shop operation would automatically cover all the open-shop operations and the open-shop side.

Open-shop employees would have a collective bargaining agreement imposed on them, regardless of the legality of dualshop operations. Sham operations and legitimate companies would be treated the same.

If the union shop has a union security clause in its contract, as most do, the consequences would be especially severe. In non-right to work states, open-shop employees would have 7 days to join the union or pay union dues or they would be fired. Now, what do you think of that for freedom?

I was interested in our Chairman of this Committee and his assertions that this is hogwash. I think it is hogwash to take people's free rights away, whether they belong to or do not belong to a union, and to nullify even in part the right to work laws of this country. It is unbelievable, but that is what this bill does.

In non-right to work States, open-shop employees would have 7 days to join the union and pay union dues or they no longer have a job. Now, in right to work States they would not have to join a union but could be required to obtain work through the union hiring hall. I want to tell you something: That is a significant obstacle. In many cases, they would be placed at the bottom of the seniority list and would be given no credit for their actual open-shop work experience. Now, I am sure that is something that could be changed, but one such amendment will not correct this bill.

It would appear that S. 492 makes open-shop employees of dual-shop operations second class citizens. The rights guaranteed to all workers under the National Labor Relations Act to choose whether to be represented by a bargaining agent and who that agent will be will not apply to them. A significant group of people will lose their franchise, their rights under previously guaranteed by law

In the zeal of those who are sponsoring this bill and pushing it with everything they have to give the upper hand to the one side of the equation rather than to maintain balance, these open-shop employees would be disenfranchised.

S. 492 is flawed in concept, it is flawed in definition, and it is flawed in principle. S. 492 in my opinion should not be enacted, and I hope that this hearing will enable my colleagues to learn what hope that this hearing will bring about to those who want freedom at the work place. And, I hope this hearing will enable all our colleagues to learn what this bill really means and they will join us in opposing it.

Now, let me just say this: There is a lot involved in this bill. It is not some inconsequential piece of labor legislation. The reason it is so difficult to enact labor legislation in this country is because one side or the other is always trying to gain advantage, and this is a situation where one side is really pushing to gain advantage over the other.

Frankly, I think the law should be enforced against sham companies and against those who violate the present law, but that does not mean you do it by changing the law to give one side a superior right to the other in the total bargaining process in this country.

I also believe that unions are somewhat shortsighted with this bill. Either everything is going to turn union in the construction industry or everything is going to go non-union. And I can tell you, we do not know which way it will go, but either way it would be a hardship, I think a very sad day for this country if it went either way.

I think it is important that we have the balance that unions bring and I think it is important that we all understand that.

Well, I look forward to the hearings, I look forward to reading the transcripts and I look forward to what the witnesses have to say, all of them. And I appreciate you, Mr. Chairman, for conducting a fair hearing and I appreciate the consideration that you gave to us.

Thank you.

Senator **Metzenbaum**. Thank you very much, Senator Hatch. Senator Hatch, with your permission——

Senator **Hatch**. Could I put a copy of the letter to the AGC in the record. That is what you were going to——

Senator **Metzenbaum**. Yes, I think there are two of those letters.

Senator **Hatch**. Yes, we will put both of those in the record.

Senator **Metzenbaum**. They will be included in the record at this point.

Senator **Hatch**. Thank you.

[The letters referred to follow:]

EDWARD M. KENNEDY, CHAIRMAN

CLAIBORNE PELL, RHODE ISLAND
HOWARD M. METZENBAUM, OHIO
SPARK M. MATSUNAGA, HAWAII
CHRISTOPHER J. DODD, CONNECTICUT
PAUL SIMON, ILLINOIS
TOM HARKIN, IOWA
BROCK ADAMS, WASHINGTON
BARBARA A. MIKULSKI, MARYLAND

ORRIN G. HATCH, UTAH
ROBERT T. STAFFORD, VERMONT
DAN QUAYLE, INDIANA
STROM THURMOND, SOUTH CAROLINA
LOWELL P. WEICKER, JR., CONNECTICUT
THAD COCHRAN, MISSISSIPPI
GORDON J. HUMPHREY, NEW HAMPSHIRE

THOMAS M. ROLLINS, STAFF DIRECTOR AND CHIEF COUNSEL
HAYDEN G. BRYAN, MINORITY STAFF DIRECTOR

United States Senate
COMMITTEE ON LABOR AND
HUMAN RESOURCES
WASHINGTON, DC 20510

June 2, 1987

Charles E. Hawkins III, CAE
Vice President, Government Affairs
Associated Builders & Contractors, Inc.
729 15th Street, N.W.
Washington, D.C. 20005

Dear Charlie:

As I am sure you know, it has been very difficult to accommodate all of the parties interested in testifying at the upcoming Subcommittee on Labor hearing on S. 492, the Construction Industry Labor Law Amendments of 1987. Quite frankly, it would be impossible to provide everyone with an opportunity to present oral testimony. Consequently, an effort has been made to ensure that the hearings in the Senate reflect the spectrum of opinion on this legislation.

With these limitations and objectives in mind, I have asked Senator Metzenbaum and he has agreed to my request to allow Mr. Howard Jenkins, Special Counsel to the National Association of Minority Contractors, to testify in place of the representative from the Associated General Contractors.

Charlie, I feel that Senator Metzenbaum has been most fair in working with us on the selection of witnesses, and that the final witness list will ensure that the Committee is apprised of the spectrum of views concerning S. 492. I hope you share my feelings on this issue and ask that you write Senator Metzenbaum a short note to indicate this sentiment.

I look forward to working with you on this issue.

Sincerely,

Orrin G. Hatch
Ranking Minority Member

cc:Senator Howard Metzenbaum

EDWARD M. KENNEDY, CHAIRMAN

CLAIBORNE PELL, RHODE ISLAND
HOWARD M. METZENBAUM, OHIO
SPARK M. MATSUNAGA, HAWAII
CHRISTOPHER J. DODD, CONNECTICUT
PAUL SIMON, ILLINOIS
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GORDON J. HUMPHREY, NEW HAMPSHIRE

THOMAS M. ROLLINS, STAFF DIRECTOR AND CHIEF COUNSEL
HAYDEN G. BRYAN, MINORITY STAFF DIRECTOR

United States Senate
COMMITTEE ON LABOR AND
HUMAN RESOURCES
WASHINGTON, DC 20510-6300

June 2, 1987

Mr. Hubert Beatty
Executive Vice President
Associated General Contractors of
America
1957 E Street, N.W.
Washington, D.C., 20006

Dear Mr. Beatty:

As I am sure you know, it has been very difficult to accommodate all of the parties interested in testifying at the upcoming Subcommittee on Labor hearing on S. 492, the Construction Industry Labor Law Amendments of 1987. Quite frankly, it would be impossible to provide everyone with an opportunity to present oral testimony. Consequently, an effort has been made to ensure that the hearings in the Senate reflect the spectrum of opinion on this legislation.

With these limitations and objectives in mind, I have asked Senator Metzenbaum and he has agreed to my request to allow Mr. Howard Jenkins, Special Counsel to the National Association of Minority Contractors, to testify in place of the representative of your organization. Naturally, your organization's prepared statement will be made part of the official record of the hearing.

Mr. Beatty, I know how important S. 492 is to your members. I feel, however, that Mr. Jenkins should be provided an opportunity to testify. I hope that this last minute change will not inconvenience either you or your organization, and I apologize for any difficulties caused by this last minute change in plans.

Sincerely,

Orrin G. Hatch
Ranking Minority Member

cc:Senator Howard Metzenbaum

Senator METZENBAUM. Mr. Rosenfeld, we are happy to have you with us this morning, but I want to point out to you that it was a month ago that I invited the Department of Labor to testify at this hearing and, although our letter requested that your testimony be submitted to us at least three days in advance, we did not receive your statement until after 6:00 o'clock yesterday.

Now, the man sitting on my left, Senator Quayle, has stressed time and time again that witnesses be required to submit testimony at least 24 hours in advance. At a Subcommittee hearing in March, Senator Quayle requested of the Chair that, "In the future we get testimony a day in advance." He added, "I know sometimes people have problems, particularly out of state and out of town witnesses, but it sure would be helpful to us and to me if you could do that."

I could not agree with him more. I am in total accord with him and, in addition to everything else, it is in accordance with the specifics of our rules. All of our out of town witnesses submitted their testimony 3 days ahead. You are the only witness appearing today who has not met the 24-hour rule. Regrettably, this is an all too familiar pattern with respect to our dealings with the Department of Labor.

All too often the Administration does not get its testimony in to this Committee until the last minute. When we invite witnesses to testify, we want the panel to be able to prepare for their testimony and to ask sensible questions based upon that testimony. I know that this matter is beyond your control, so I do not address my remarks to you in a personal manner, but it should not be beyond the control of Secretary Brock.

I want the Department to understand that in the future if the Administration fails to adhere to the 24-hour rule before this Committee, I will in all probability not permit the Department of Labor to give oral testimony on the day of hearing and will put their written statement in the record. I hope you will take that message back to the Department of Labor. We want to hear from the Department of Labor, we are interested in their position, we want to work with the Department of Labor, but we do not think it is fair to expect members of this Committee to get testimony after 6:00 o'clock at night or less than 24 hours the day before, or less than 24 hours before a hearing and expect us to be able to ask intelligent questions.

Senator Quayle?

Senator QUAYLE. Let me just make an observation. I entirely agree with what the Chairman is saying. There is a lot of importance attached to this 24-hour rule. I did bring it up and I think it not only applies to the Department of Labor, but I think all people in the administration and also all groups that are here in Washington that have the basic staff availability that are going to do these things in advance ought to be put on notice of what the Chairman is saying today, that if in fact you cannot comply with this 24-hour rule—sure, there may be exceptions, particularly for the out of State witnesses that may be unfamiliar with the rules and operations of the Senate, but those that are familiar, and the Chair—and I concur—is going to expect, as a matter of fact he is going to hold as a potential option not to allow witnesses to testify, and I think it would be applied across the board to all.

Senator METZENBAUM. Right.

Senator QUAYLE. So I think this is not just a notice to the Department of Labor, I think this is a notice to everybody that is going to come before this Committee, that it is very important for Senators. I took this book home last night and the Department of Labor briefing was not in there. You took home your briefing books. We want to know what angles are going to be brought up; are there going to be new issues, if there are new issues we have to look at the relevancy of them and to be able to have a good discussion.

So I just underscore what you have said. I think it is very, very important and I am glad to see you bring it up.

Thank you.

Senator METZENBAUM. Thank you.

I see that Senator Stafford has joined us. Senator Stafford, do you have an opening statement?

Senator STAFFORD. Thank you very much, Mr. Chairman. I do not. I certainly join in the belief that we ought to have statements before this and all of our Committees at least 24 hours in advance.

Senator METZENBAUM. Thank you very much.

The CHAIRMAN. Mr. Chairman, I hope that the message will go back. We are having hearings with the Secretary of Labor next week on minimum wage, so I would hope that we would get the position of the administration in conformance with the Committee's rules and I hope that that message goes back to the Department. I completely support the point that the Senator from Ohio made.

Senator METZENBAUM. With those prefatory statements, Mr. Rosenfeld, we are very happy to hear from you. [Laughter.]

Better late than never.

Before you proceed, let me insert in the record a statement from Senator Murkowski concerning the bill.

[The prepared statement of Senator Murkowski, with an attachment, follows:]

Statement Submitted by Senator Murkowski for the June 4, 1987
Senate Labor and Human Resources Committee Hearing on S. 492, the
"Double-Breasting Bill.

Members of the Senate Labor and Human Resources Committee:

National labor organizations have strongly urged me to support S. 492. I understand their arguments, as they attempt to address the problems they face around the country, but I am not persuaded that the bill will help Alaska labor.

Construction in Alaska has declined 60% since 1983, and given the present depressed economic situation in Alaska, many Alaska contractors, if forced to choose between union and non-union shops, under S. 492, would likely go non-union to remain competitive. This would benefit no one. What may help national labor may hurt Alaska labor. (The enclosed article from the Detroit News by Warren T. Brookes raises this point as well.)

Quite often, national labor organizations do not fully understand the labor situation in Alaska. For example, some national unions are attempting to stop the construction of an export refinery in Valdez by amending pending trade legislation. I am opposed to this effort. The refinery will provide jobs to Alaska labor, and it certainly should go forward.

So, when national labor asks for my support on S. 492 I will evaluate how it affects Alaska's working men and women. In my view, the bill as it presently reads will not benefit Alaskans.

I do hope that each committee member today will the do the same, and ask how S. 492 as written will affect their own state's working men and women. It just may be that the Alaskan situation may not be all that unique.

Frank H. Murkowski

Detroit News May 11 1987

Are Construction Unions Bent on Suicide?

By Warren T. Brookes

There is very little disagreement among economists that protectionism from competition either at home or abroad is ultimately suicidal, both for industries and nations.

Not only is it increasingly impossible to insulate any industry or [illegible] tion, but such protection invariably promotes still more waste and inefficiency, and invites even tougher competition.

Currently the nation's building contractors and their allies in the National Right To Work Committee are up in arms over a new proposal (HR281/S492) to stop the practice of "double breasting" by unionized construction firms that set up parallel dummy non-union "cousins" to evade union contracts.

BUT, IRONICALLY, should such a law ever pass, the biggest losers would be the construction trade unions themselves. As one of the leading labor economists in the country (and a pro-union theorist) Steven Allen of North Carolina State warns:

If this law is passed, the unionized contractors, who are already declining in number, will simply stop signing new contracts, and more construction will go to the non-union sector."

Why Construction Unions Are Losing Out

	Union Wage Premium	Union Prod. Advantage Nom	Real	Union Membership	% of Const. Jobs w/Union Wage
1972	60.0%	49.0%	22.0%	44.4%	31.6%
1977	60.3%	21.0%	8.0%	41.1%	29.2
1983	45.6%	24.2%	[illegible]	34.0%	–

Source: "Declining Unionization in Construction," Working Paper [illegible], Steven G. Allen, North Carolina State, February 1986

This may explain why the strongest opposition to this proposed legislation is coming from the already non-union independent contractors, who see still more competition coming down the pike, but from the larger, unionized contractors.

In a February 1986 research paper, Professor Allen shows that construction unions have been losing their share of the market rapidly, falling from 31.6 percent of all jobs at union wages in 1973 to 18 percent in 1983.

IN THE paper, Allen also shows the reason: During the 1960s and into the early 1970s union construction workers enjoyed a significant productivity advantage over non-union workers. But gradually that union productivity advantage was eroded, even as the union wage-premium stayed high. By the late 1970s, the union productivity advantage was gone, and all that remained was the wage premium.

Yet, Allen concludes, "while the wage gap may have played a role in the early stages of the decline in construction unionism in the early 1970s, it did not account for the precipitous decline in the late 1970s. In fact, the wage gap actually started narrowing in 1979, and is now near its 1966 level" when construction unions were at their peak.

Allen says "the main reason for the decline in unionization in this period is a dramatic erosion in the union/non-union productivity gap. Comparisons of estimates from the 1972, 1977, and 1982 Census of Construction Industries indicate that this gap has vanished."

The facts seem to bear him out. In 1972, the wage gap between union and non-union workers was [illegible] training and skills the unions enjoyed a productivity advantage over the independent contractors of nearly 50 percent. And even after wage deflation the advantage was 22 percent.

AT THAT time, some 44 percent of all construction workers were unionized, and 31.6 percent of all jobs were held by union workers receiving union scale.

But, by 1977, that productivity gap had fallen to 21 percent inflated and 8 percent real, even as the wage premium remained at 60 percent. With fringe benefits it was actually more than 80 percent. At this point union dominance suddenly began to fall, and more and more contractors resorted to training and using non-journeyman carpenters and construction crews.

To retaliate, more and more of the major contractors began double-breasting, forming bogus, "separate," non-union firms to go after work they were rapidly losing to the independents, and a growing number of their skilled union workers began to work at non-union wages.

By 1983, union membership was down to 34 percent, and the actual percentage of jobs held by union members receiving union pay had fallen to 18 percent, a 38-percent drop in just six years.

IN FACT, the percentage of union members taking non-union wages rose from 19 percent in 1977 to 46 percent by 1981, and an estimated 52-percent majority by 1983, while union membership among the young construction workers is now below 30 percent.

The question is: Why did the union productivity advantage disappear? Allen hints, by inversion, at the reasons: "The main source of the union productivity advantage in the early 1970s seems to have been better training, economies in recruiting and screening provided by the union hiring hall, and better management."

In short, unions used to do a better job for their workers and their industry than they do now. Their anti-double-breasting law would only worsen this erosion, just as protectionism destroyed the steel industry and its unions in less than a decade.

STATEMENT OF ARTHUR F. ROSENFELD, SPECIAL ASSISTANT TO THE SOLICITOR, U.S. DEPARTMENT OF LABOR

Mr. **Rosenfeld**. Thank you. Happy birthday, and I think I am leaving town. [Laughter.]

I apologize first of all to the Chairman and members of the Committee. I will take that message back.

Senator **Stafford**. Mr. Chairman, could he bring the mike up a little closer so that we can all hear.

Senator **Metzenbaum**. And I will say, Mr. Rosenfeld, that we have a number of witnesses and I think most witnesses have been advised that we have a five-minute rule as far as oral testimony is concerned.

Mr. **Rosenfeld**. Thank you, Mr. Chairman. Can you hear me?

Senator **Stafford**. Just barely. Those microphones came over on the Mayflower and they never have worked very well. [Laughter.]

Mr. **Rosenfeld**. I thank the Chairman and members of the Committee for the opportunity to be here today to testify on behalf of the Department of Labor regarding S. 492, the Construction Industry Labor Law Amendments of 1987.

If I may be permitted a few minutes to summarize the thrust of our testimony, which I request be made a part of the record, I would then be pleased to try to answer any questions that you may have.

Senator **Metzenbaum**. Without objection, all of the witnesses' full statements will be included in the record.

Mr. **Rosenfeld**. Thank you.

The construction industry is indeed unique, with unique problems and unique solutions. In the late 1940s, when the National Labor Relations Board began to assert jurisdiction over employers in the construction industry, it became readily apparent that the procedures, principles and policies developed in the industrial sector did not necessarily convey smoothly to the construction industry.

The nature of employment in the industry is often temporary, transitory and seasonal. This fact, in concert with the need for a contractor to know his labor costs before making an estimate upon which to base his bid, and additionally the fact that a contractor, given the nature of construction projects, had to have access to a supply of skilled craftsmen, led to practices in the industry which were impermissible in other than the construction industry.

This caused much consternation for contractors, unions, employees, the NLRB and the courts and, I might add, Congress also. In 1959, Congress enacted legislation recognizing and legitimizing certain practices and privileges unique to the construction industry.

For example, section 8(f) of the Act permits a contractor to recognize and enter into an agreement with a union that has not yet demonstrated majority status. In fact, this agreement, commonly referred to as a pre-hire agreement, may be entered into prior to the employment of any unit employees. The parties to the collective bargaining agreement may agree to include provisions providing for required membership in the union following the seventh day of employment, as compared to the 30-day requirement outside of the industry, provide for exclusive referral by the union of applicants for employment, provide that employees pass a proficiency examination or some other means of demonstration of qualifications for employment, such as participation in a union-sponsored apprenticeship program, and, further, provide for special seniority priorities.

In addition, section 8(e) of the Act also adopted in 1959 permits a contractor and a union to enter into an agreement providing that subcontracting will be limited to contractors signatory to the union agreement. We do not intend to here express any opinion as to the special requirements and practices in the construction industry. However, we must note that some of these practices impact to some degree on the rights guaranteed to employees in section 7 of the Act.

As the Supreme Court noted in its discussion of the provisions contained within section 8(f) in its Higdon decision in 1978, "Privileging unions and employers to execute and observe pre-hire agreements in an effort to accommodate the special circumstances in the construction industry may have greatly convenienced unions and employers, but in no sense can it be portrayed as an expression of the employees' organizational wishes."

We believe that current law as applied by the NLRB and interpreted by the courts has struck an accommodation between the unique needs of the construction industry and the seminal principles of majority rule. We oppose S. 492 for two primary reasons.

First, current law effectively and appropriately addresses the practices of double-breasting and pre-hire agreements in the construction industry; second, the provisions of this bill are contrary to the basic principle which underlies our Nation's labor-management laws, that of employee free choice to decide whether or not to engage in concerted activity.

Thank you.

[The prepared statement of Mr. Rosenfeld follows:]

STATEMENT OF ARTHUR F. ROSENFELD
SPECIAL ASSISTANT TO THE SOLICITOR
U.S. DEPARTMENT OF LABOR
BEFORE THE
SUBCOMMITTEE ON LABOR
OF THE
COMMITTEE ON LABOR AND HUMAN RESOURCES
UNITED STATES SENATE

June 4, 1987

Mr. Chairman and Members of the Subcommittee:

I am pleased to be here today to testify on behalf of the Department of Labor regarding S. 492, the "Construction Industry Labor Law Amendments of 1987."

The Administration strongly opposes this legislation for two primary reasons. First, current law effectively and appropriately addresses the practices of "double-breasting" and "pre-hire agreements" in the construction industry. Second, the provisions of this bill are contrary to the basic principle which underlies our Nation's labor-management laws, that of employee free choice to decide whether or not to engage in concerted activity.

DOUBLE-BREASTING

I would first like to address the issue of dual shops, or what is commonly referred to as "double-breasting". Double-breasting is a well-established practice in the construction industry whereby a business entity has separate companies or subsidiaries, one of which is subject to a collective bargaining agreement, and the other which is not.

In order to ensure that companies do not establish "sham" operations to avoid the obligations of collective bargaining agreements, double-breasting is permitted under current law only if a requisite degree of separateness exists between the two entities. The relevant factors to be considered in determining whether two entities are separate were set forth by the courts and the National Labor Relations Board (the "Board") in the matter of Peter Kiewit and Sons, Inc. (Local 627, Operating Engineers (Peter Kiewit and Sons Inc.). 206 NLRB 562 (1973), enforcement denied, 518 F.2d 1040 (D.C. Cir. 1975), aff'd in part, vacated in part sub nom. South Prairie Const. Co. v. Local 627, Operating Engineers, 425 U.S. 800 800 (1976), decision on remand, 231 NLRB 76 (1977), enforced, 595 F.2d 844 (D.C. Cir. 1979)). This case (hereinafter referred to as Kiewit), which involved construction company with both a union and a non-union subsidiary, travelled a tortured path, starting at the Board, then to the D.C. Court of Appeals, up to the Supreme Court, back to the Board, and finally once again to the Court of Appeals. The case served to develop current rules that apply in double-breasting situations.

Under Kiewit, it must first be determined whether, despite the existence of two entities, a "single employer" truly exists.

In making that determination, the Board considers whether the following four factors are present: (1) the interrelation of operations; (2) common management; (3) centralized control of labor relations; and (4) common ownership. None of these factors need be controlling nor need all of them be present. The "single employer" test under current law is thus based on a qualitative examination of all the circumstances of each case in order to determine whether the relationship between two operations is "characteristic of the arm's length relationship found among unintegrated companies." (Kiewit (1979))

If it is determined that the entities constitute a "single employer", a second inquiry must be made as to whether the employees of the two entities have a "community of interests" sufficient to constitute a single "appropriate bargaining unit." In deciding whether there is such a "community of interest", the Board will consider such factors as "the bargaining history, the financial integration of operations, the differences in the types of work and skills of employees, the extent of centralization of management and supervision, particularly in regard to labor relations, hiring, discipline, and control of day-to-day operations, and the extent of interchange and contact between groups of employees." (Kiewit (1977))

As the Board noted in Kiewit, this latter determination as to whether there exists a community of interest is essential "in order to assure to employees the fullest freedom in exercising the rights guaranteed by the [NLRA]." (Kiewit (1977)) Different groups of employees may have diverse interests with respect to the terms and conditions of employment. The application of an agreement negotiated by one group of employees to reflect their interests to another group of employees with different interests would constitute a serious violation of employee free choice principles.

If both of these determinations, that is whether there is a single employer and whether there is an appropriate bargaining unit, are affirmative, then the collective bargaining agreement and the bargaining relationship are binding on both entities. If either of these determinations is negative, each group of employees retains the right to determine independently whether or not they wish to engage in concerted activity.

In addition to the Kiewit test, the Board may also apply the "alter ego" doctrine. Under that doctrine, if the Board finds that the owners of a company subject to a collective bargaining agreement form another entity (or an alter ego) to which they transfer a substantial portion of their assets, employees and customers for the purpose of avoiding collective bargaining obligations, the terms of the collective bargaining agreement will be applied to the second entity.

The Administration believes that these remedies available under current law provide sufficient protection to ensure that double-breasting is not used to evade collective bargaining obligations.

The current approach also recognizes that, given the structure of the construction industry, there are legitimate reasons for employers to operate separate companies. Moreover, the current approach focuses on the interests of each group of employees to ensure that free choice principles are protected.

S. 492 would abandon this approach and effectively eliminate all double-breasting operations.

The bill would amend section 2(2) of the NLRA to expand the definition of a single employer in the construction industry to two or more business entities conducting similar work that have any direct or indirect common ownership or management, or control.

This overbroad definition, which would provide that the presence of any degree of any one of the factors leads to a single employer finding, would serve to eliminate all double-breasted operations. It would do so without the benefit of the qualitative analysis of current law which requires a finding of an actual interrelationship of operations and common management.

Thus, for example, under the bill's definition, any common ownership would lead to a single employer finding, even absent any form of integrated control. Without such control, it is difficult to invision how an entity could use double-breasting to divert work to another entity to avoid collective bargaining obligations.

The bill would also amend section 8(d) of the NLRA to provide that whenever the collective bargaining involves employees of a business entity comprising part of a single employer in the construction industry, the duty to bargain collectively shall include the duty to apply the terms of a collective bargaining agreement between such business entity and a labor organization to all other business entities comprising the single employer within the geographical area covered by the agreement.

Thus, the bill eliminates the "community of interest" inquiry and imposes the terms and conditions of a collective bargaining agreement on a group of employees regardless of whether the non-union employees of a separate entity want to be subject to such an agreement and regardless of whether those employees have any interests in common with the employees on whose behalf the contract was actually negotiated.

This legislation assumes that all double-breasted operations are designed for the impermissible purpose of evading collective bargaining obligations. It also assumes that all separate groups of employees associated with "single employers" share a community of interest sufficient to constitute an appropriate bargaining unit. The Administration does not believe that these assumptions are justified. Consequently, we believe these provisions of S. 492 are unwarranted. Current law strikes an appropriate balance that allows the Board to identify misconduct and to protect employee free choice.

PRE-HIRE AGREEMENTS

I would now like to address the issue of pre-hire agreements. A pre-hire agreement is a collective bargaining agreement between an employer and a union that is made before the union has demonstrated majority support among covered employees. Indeed, in many circumstances, these agreements have been entered into before any employees have been hired. It must be kept in mind that such agreements are contrary to the general rule that it is an unfair labor practice for an employer to recognize and enter into an agreement with a union that has not demonstrated majority support. However, in 1959 Congress amended the NLRA to add section 8(f) as an exception to the general rule. Section 8(f) allows employers in the construction industry to enter into pre-hire agreements establishing the terms and conditions of employment, which may include the use of union hiring halls as the exclusive source of employees, a 7-day union security clause which, where State law allows, requires employees to join a union within 7 days of employment, and minimum training or experience qualifications, such as participation in union-sponsored apprenticeship programs.

Section 8(f) was enacted in recognition of the unique conditions existing in the construction industry, such as the temporary, transitory and sometimes seasonal nature of construction projects, the needs of employers for a reliable pool of skilled labor, and the need for some predictability of labor costs in order to prepare bids. In particular, Congress realized that it takes the Board several months to process a petition for an election, conduct the election, and then certify the results. By the time the process is completed for workers at most construction sites, the construction project may have been finished, and the employees may have moved on to new jobs.

The rules that the Board will apply to pre-hire agreements made pursuant to section 8(f) were changed February 20 of this year, when the NLRB issued a decision in the case of John Deklewa and Sons, Inc. 281 NLRB No. 184.

Before its Deklewa decision, the Board applied to pre-hire agreements the rules announced in the 1971 case of R. J. Smith.

Under those rules, either party to a pre-hire agreement could repudiate that agreement for any reason prior to a showing that the signatory union enjoyed majority support.

The rules also provided for a "conversion doctrine", under which during the course of an 8(f) agreement the relationship between the parties could be converted into an "exclusive representative" relationship equivalent to that held by a union that had demonstrated majority support under section 9(a). This conversion to a 9(a) relationship however, could be based on an evidentiary showing of majority support that was far less rigorous than the secret ballot election or voluntary recognition methods required under section 9(a).

Section 9(a) representatives enjoy an irrebuttable presumption of majority status for the duration of the agreement, and a rebuttable presumption of majority status upon expiration of an agreement. The irrebuttable presumption acts to bar the conduct of an election regarding representation during the term of the agreement. The rebuttable presumption requires the maintenance of the bargaining relationship after termination of the agreement. Therefore, after "conversion", upon expiration of the pre-hire agreement the employer has a continuing duty to bargain with the union.

Deklewa changes these ground rules. It should be noted that the specific parameters of these new rules will be developed on a case-by-case basis. However, it is clear that under that decision, neither party to a pre-hire agreement will be permitted to unilaterally repudiate that agreement. The parties will be compelled to comply with that agreement unless the employees vote, in an NLRB conducted election, to reject or change their bargaining representative.

The conversion doctrine is eliminated. Thus, during its term, an 8(f) contract cannot be converted into a 9(a) contract so as to act as a bar to election petitions. Only upon the certification of a union following an NLRB conducted election will the full panoply of section 9 rights and obligations obtain. A vote to reject the signatory union will void the 8(f) agreement and will terminate the 8(f) relationship.

Upon expiration of the pre-hire agreement, the signatory union will enjoy no presumption of majority status, and either party may repudiate the 8(f) bargaining relationship.

The Deklewa decision attempts to strike a delicate balance between the dual objectives of promoting labor relations stability and protecting employee free choice. The decision recognizes the special status conferred to the construction industry under section 8(f) and holds that pre-hire agreements are effectively binding despite the absence of a showing of majority support. However, the decision also limits this special treatment to the term of the pre-hire agreement, and once the agreement expires, ensures that the principle of majority support be realized before require further collective bargaining. (The parties, of course, are free to enter into a new pre-hire agreement).

S. 492, which was introduced before the Deklewa decision, would provide that a pre-hire agreement made under 8(f) would impose the same obligations upon the parties as an agreement made pursuant to section 9(a).

This provision would seriously undermine the balance struck in Deklewa. Without any showing of majority support on the part of the union, employees would be bound by the terms of a pre-hire agreement without the opportunity to conduct an election during the term of the agreement. In addition, the legislation would require the continuation of a bargaining relationship by the parties after the pre-hire agreement expires.

The Administration believes that imposing 9(a) obligations on parties to a pre-hire agreement would seriously and unacceptably erode employee free choice principles. Congress has deemed that the unique circumstances of the construction industry justify pre-hire agreements, and the Deklewa decision has made such agreements binding. The Administration believes that any further intrusion on traditional majority rule principles would be unwarranted and we therefore strongly oppose S. 492.

Senator METZENBAUM. Thank you very much, Mr. Rosenfeld.

Senator Quayle, do you have any questions.

Senator QUAYLE. I just have one line of questioning. The argument that is advanced for the need for this legislation basically goes along the line that it is necessary to prevent employers from evading their collective bargaining responsibilities. In other words, what has happened is that they enter into this one collective bargaining arrangement that may be as a union shop and then they go ahead and create this other corporation and then they use nonunion employees, and they do this as a way to get around the collective bargaining agreement.

If they do that, it is in my judgment illegal. It is certainly wrong, and I wonder if you might just give us, first if you could and a comment on the legality of that and, second, if in fact that type of thing is going on which through all these allegations some of this practice is going on. We have heard a lot about this. What are you doing to enforce what I perceive is a binding legal contract, and not allow it to be circumvented? Those are the two issues that I wish that you would respond to.

Mr. ROSENFELD. Well, let me start by addressing your second question, by saying simply that the Department of Labor has no administrative responsibilities for the National Labor Relations Act.

Senator QUAYLE. So that is all in their domain and you do not have anything to do with it. Now, from your viewpoint, are they doing a good job in this area or not doing a good job? What would be your assessment?

Mr. ROSENFELD. We agree that there must be an interdiction of an effort to divert work to avoid obligations under a collective bargaining agreement. That is not to say that we agree that there has been much of that going on that has not been remedied.

In my review of the cases—and there are a host of cases in this area——

Senator QUAYLE. What is your feeling? Is it your feeling that there is a lot of this activity going on that is wrong and perhaps an unfair labor practice or there is not? What would be your judgment?

Mr. ROSENFELD. Well, that is a tough question. I am going to answer that I guess as an individual, rather than as a representative of the Department of Labor, if I might. In my experience, when I practiced, double-breasting occurred not for the purpose of avoiding contracts but for competitive reasons. That is not to say that over the last 10 or 20 years there has not been a company or companies that have engaged in sham operations or have set up an operation, a shell, in order to avoid obligations that they voluntarily and freely entered into. But in those cases, when they come before the Board and the courts, remedies are available and remedies have been applied.

Senator QUAYLE. But it is an unfair labor practice, is it not——

Mr. ROSENFELD. It is, sir.

Senator QUAYLE [continuing]. To basically evade the collective bargaining responsibilities by setting up these.

Mr. ROSENFELD. Runaway shops are illegal, alterego sham operations are illegal.

Senator QUAYLE. They are illegal under current law?

Mr. ROSENFELD. Under current law. And in some cases double-breasted operations that were not created for the purpose of evading obligations are not necessarily illegal, but after a finding of single-employer status and then a finding of a community of interest between the employees, the two entities would be impermissible.

Senator QUAYLE. Thank you, Mr. Chairman.

Senator METZENBAUM. Thank you. I thought your question was an interesting one, Senator Quayle, and I want to just pursue it for a moment.

If you have difficulty with the legislation as drafted, pursuant to the responses that you have given to Senator Quayle, do you think perhaps legislation could be crafted with the Department of Labor's support that would specifically prohibit the creation of a second operation by an employer that on its face evades or avoids the employer's obligations under its original contract?

Mr. ROSENFELD. I will say with great confidence, because I am here now, that we would very much like to work with you to take a look at that. I would think that, given the expertise of yourself, the members of this panel and everybody sitting behind you, that legislation could be drafted directed specifically at that.

Senator METZENBAUM. I think that there would be some merit to exploring that avenue, because along the lines of Senator Quayle's questioning and your responses, it seems to me that we might be able to make considerable headway on a piece of legislation that would meet the problem and at the same time gain the support of some of my colleagues such as Senator Quayle and others and also gain the support of the administration. We will explore that with you.

Senator Kennedy?

Senator KENNEDY. The fact remains, Mr. Rosenfeld, that you cannot have it both ways. You cannot come on up here and say we are against the legislation and then dance around the questions about whether you are going to express a personal opinion or not. The existing law does not work in these circumstances. You basically have to prove intent, and that has not worked. We have got a growing problem, and not to address that in the course of your own testimony, I think basically circumvents the whole purpose and function of your own presence here. I think it just has not worked.

How many cases have been brought in terms of looking at these kinds of double-breasted type situations? Do you know?

Mr. ROSENFELD. I have no idea, but I have read——

Senator KENNEDY. So you do not know whether the current law does work or does not work, do you.

Mr. ROSENFELD. Well, I know that the cases I have read——

Senator KENNEDY. Can you speak up a little? I cannot hear you.

Mr. ROSENFELD. I know in those cases that I have read, the situation, when brought to the attention of the Board, has been remedied. I cannot speak, Senator, to cases that have not been brought. These cases are undertaken on a case by case examination of factors.

Senator KENNEDY. I have no further questions.

Senator METZENBAUM. Thank you.

Senator Hatch—excuse me, Senator Humphrey?

Senator **Humphrey**. Senator Stafford was here first.

Senator **Metzenbaum**. Senator Stafford?

Senator **Stafford**. Thank you, Mr. Chairman. I have no questions of this witness.

Senator **Metzenbaum**. Senator Humphrey?

Senator **Humphrey**. No questions.

Senator **Metzenbaum**. Thank you very much, Mr. Rosenfeld.

Mr. **Rosenfeld**. Thank you very much.

Senator **Metzenbaum**. Our next witness is Robert Georgine, the well known and well respected President of the Building and Construction Trades Department of the AFL–CIO. We are happy to welcome you here this morning, Mr. Georgine.

Mr. Georgine, you know our five-minute rule and you can introduce the gentlemen accompanying you.

STATEMENT OF ROBERT A. GEORGINE, PRESIDENT, BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AMERICAN FEDERATION OF LABOR-CONGRESS OF INDUSTRIAL ORGANIZATION, ACCOMPANIED BY LARRY COHEN, GENERAL COUNSEL; AND LEO ZEFFERETTI, LEGISLATIVE DIRECTOR

Mr. **Georgine**. Thank you, Mr. Chairman.

I have at my right Larry Cohen, who is our General Counsel and has——

Senator **Metzenbaum**. Bring the mike closer to you. Thank you.

Mr. **Georgine**. I have at my right Larry Cohen, who is our General Counsel, and Leo Zefferetti, who is our Legislative Director.

I want to thank you, Mr. Chairman, for the opportunity to appear before this Committee and discuss S. 492. I have submitted to the Committee a detailed statement that traces the history of the National Labor Relations Act's application to the construction industry and describes the erroneous line of NLRB cases on double-breasting and pre-hire agreements that created the need for this bill.

It also responds to the objections that have been raised by the bill's opponents. It was in here timely, Mr. Chairman, and it really responds to some of the issues raised by Senator Quayle. I would hope that you read it, Senator.

I respectfully request that it be made a part of the record.

There is nothing whatsoever complicated about the greedy, cynical and dishonest practice in the construction industry known as double-breasting. Double-breasting describes the existing procedure that enables a company to take its same organization, its same equipment, its same personnel and divide itself into two companies, one to employ workers under the terms of a contract it voluntarily negotiated and signed, and the other company providing the method by which to completely disregard that contract.

Because of the procedure, two grabs at the prize ring, as the business carousel revolves and, to mix metaphors, pit worker against worker for survival in a jungle specifically picked for that fatal game. Thus, the real question in this forensic engagement over whether construction companies should be prohibited from engaging in double-breasting is quite simply should construction companies be required to keep their word and to live up to their legal obligations.

H.R. 281, the proposed ban on double-breasting, along with S. 492, contains no language that would force workers to join a union, nor does it contain any language that would force employers to hire union workers. It does not give to workers any new picketing privileges. It neither increases nor decreases disputes at a job site. As a matter of blunt plain fact, the only issue with which it deals is the sanctity of a legal contract.

Congressional committees have recently gone to extremes to clarify the language of H.R. 281 so that there could be no possible misunderstanding of its intent, its scope or its purpose, yet opponents continue to raise objections to phraseology which does not even exist.

By no mere coincidence, the vast majority of opponents of double-breasting legislation happen to be the same individuals, the same organizations who are against any measure that protects the wages, security, health, welfare, pension or working conditions of any worker. Ironically, the same dishonesty that exists in the practice of double-breasting is carried over in the arguments against the legislation and, for that matter, against any measure designed to protect workers' rights, whether it is honoring a contract, paying a prevailing wage, making a safe place to work, or whatever, you name it.

Have we in American not had quite enough business selfishness, hostile takeovers, insider deals, phony bankruptcies, incredibly high executive bonuses after employees have been forced to accept wage reductions, ruthless discharge of veteran-experienced workers, plant closings and transfers? Is it not about time we insisted on responsibility, accountability, integrity, honesty and character in the construction and all segments of the American economy?

Double-breasting is not merely a matter of importance to men and women who work at a trade. It should be of vital concern to every believer in the rights proclaimed by the Constitution whose anniversary we currently are honoring. The need for a prohibition against double-breasting and double-dealing today is no less urgent than when the law was written in 1959, during the administration of President Eisenhower, a generation before crafty businessmen discovered a way to escape and avoid contractual obligations that they themselves negotiated and voluntarily agreed to.

The proposed legislation is designed to prohibit that practice and nothing more, Mr. Chairman. And all that the building and construction trades workers are looking for or are seeking is fairness and honesty.

Thank you. I am right under the bell. [Laughter.]

Senator **Metzenbaum**. Perfect timing. In all my days, I have never seen such perfect timing.

[The prepared statement of Mr. Georgine follows:]

TESTIMONY OF ROBERT A. GEORGINE, PRESIDENT OF THE BUILDING AND CONSRUCTION TRADES DEPARTMENT, AFL-CIO, BEFORE THE SUBCOMMITTEE ON LABOR OF THE COMMITTEE ON LABOR AND HUMAN RESOURCES UNITED STATES SENATE IN SUPPORT OF S.492

June 4, 1987

I. Introduction

I want to thank this Committee for the opportunity to appear in support of S. 492, which we view as essential to restoring stability and fairness to labor relations in the building and construction industry. The Building and Construction Trades Department is comprised of 15 national and international unions which in the aggregate represent a membership in excess of four million workers. We are, therefore, vitally concerned with the need to preserve stable relations in the construction industry, in order to serve the needs of employers, employees and the public as well.

This legislation is necessary because the National Labor Relations Board has failed to enforce certain provisions of the National Labor Relations Act in the manner which Congress intended, and instead has interpreted the Act in a manner which has undermined the stability of labor relations in this vital industry. Specifically, the Board has permitted employers in the contruction industry to avoid their collective bargaining agreements by repudiating their prehire collective bargaining agreements and unilaterally terminating their bargaining relationships, and by establishing closely related companies to operate nonunion. S. 492 would not give unions or employees any new rights. Rather, it would merely restore to unions and employees the rights which Congress intended to confer in 1959 when it amended the National Labor Relations Act.

Let me retrace for you the particular difficulties which the employees in the construction industry have faced, the efforts of Congress to seek a legislative solution for those problems in 1959, and the undermining of those efforts by the Board in the years since.

Even before the enactment of the NLRA, workers in the construction industry depended upon the collective bargaining process to assure fair wages, safe working conditions and job opportunities. As you know, Congress passed the NLRA in 1935 to protect the right of employees to bargain collectively. In the course of amending the Act in 1959, Congress specifically sought to accommodate the unique conditions in the construction industry.

Yet today, in 1987, collective bargaining in the construction industry appears to be an "endangered species" because it is virtually impossible for workers in our industry to avail themselves of their statutorily protected right to secure and maintain collective bargaining representation. This denial of their statutory rights has resulted from the failure of the administrative agency charged with enforcing those rights, the National Labor Relations Board, to apply the National Labor Relations Act to the construction industry in the way that Congress intended when it amended the Act in 1959, and in a way which takes into account the unique characteristics of the industry which set it apart from other industries. In the last fifteen years, deisions of the NLRB have ignored the special characteristics of the construction industry and Congress' desire to facilitate collective bargaining in that industry. The Board has effectively placed in the hands of employers, not workers, the power to decide whether union representation may be secured.

In order to understand the predicament that construction workers find themselves in today, you must go back and review the history of the National Labor Relations Act. The Wagner Act was the first federal statute to establish what has become an immutable principle of American law -- the right of workers to form unions and bargain collectively. But one need not be a scholar in American history to know that collective bargaining and union organization did not begin in this country with enactment of the Wagner Act. Unions had been a part of the fabric of our society long before 1935.

But in 1935, Congress was faced with a national crisis in labor relations to which it was compelled to respond. That crisis was created by the great industrial union organizing campaigns in the largest and most anti-union industries in this country. The great tide of industrial organizing had, for the first time, brought employers in the steel, auto, rubber and other major industries to the realization that federal labor legislation might be in their own best interest in the face of sit-down strikes, mass picketing, product boycotts and a myriad of other organizing techniques. Congress responded to this unrest with the Wagner Act which, as you know, in Section 7 promises that:

> Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .

The Act, while providing this right to workers in all industries, contains election provisions which were designed for elections in the industrial setting, but are totally unsuitable for the construction industry, particularly at the start of a project.

Under the Act, the NLRB was, and is, required to hold elections on an employer-by-employer basis, whenever a petition containing a sufficient showing of interest in an appropriate bargaining unit is filed. The filing of the petition is the first step on a long and winding road which may lead to the NLRB's certification of a union as collective bargaining representative. First, the employer may demand a hearing before the Board's Regional Director, at which he may contest the appropriateness of the unit, contest the placement of individuals in the bargaining unit, oppose the appropriateness of the union to represent the employees and assert a host of other arguments. Briefs may be filed. Thereafter, the Regional Director considers the arguments and evidence and issues a decision. That decision may then be appealed by way of a Request for Review to the NLRB in Washington. The Board may grant or deny the Request for Review. If the request is denied, the case is remanded to the Region for the setting of an election. If the request is granted, the matter is reviewed by the Board and a decision is issued, affirming or setting aside the Regional Director's decision. If an election is held, the employer may then challenge the ballots of individual employees or file objections to the conduct of the election or the election campaign. Again, the employer can demand a hearing on the issues raised by those challenges and objections and can appeal the Regional Director's decision to the NLRB.

The road does not end there. An employer, but not a union, may test a Board decision on certification by refusing to bargain with the union and appealing the Board's decision to a U.S. Court of Appeals.

Recent figures published by the Board indicate that, on the average, it takes 296 days to process an election petition, if contested, from the date of the filing of the petition until the date of the final NLRB decision -- almost 10 full months. And those figures are just for cases that are not appealed to the courts. Such appeals take at least several months, and often years, to process.

But we are not here today to complain about the time delays inherent in processing a contested election case before the NLRB. We are here to explain that, while such delays are severe impediments to the exercise of free choice by workers in all industries, they totally destroy the opportunity for such free choice in the construction industry. The construction industry is characterized by a work force constantly in flux, changing from employer to employer, and geographic area to geographic area, depending upon where work opportunities present themselves. Employment is seasonal and intermittent. While no precise figures are available, on the average, very few construction jobs last longer than 10 months. Therefore, even if the election procedures of the Act are invoked at the start of the job, and the union ultimately prevails, the employees will never be represented by the union. When the employer begins his next project, the union can once again invoke the election procedure and start the process all over again, hoping that the election procedure ends before the job does. Obviously, under these circumstances, employers will take advantage of all procedural steps available in order to assure that even if the union ultimately wins a legal victory, it wins nothing in fact.

Let me give you an example that demonstrates dramatically the point I have just made. In March of 1985, the

United States Court of Appeals for the Sixth Circuit enforced a decision of the NLRB in a case entitled, NLRB v. Engineers Constructors, Inc., 756 F.2d 464. That case began on June 7, 1983 when Local 1441 of the Laborers' International Union of North America filed a petition with the Board seeking certification as the bargaining representative of laborers employed by ECI at a specific job site in Memphis, Tennessee. The Board found that the work on the project, which began in January, 1983, was estimated to be completed by April of 1984. Following a hearing, an election was ordered on July 1, 1983. ECI petitioned the Board for review, trying to stall the election, but its petition was denied July 27, 1983. On July 29, 1983, the election was held and, on August 23, 1983, the union was certified as the bargaining representative of the employees at that job site. ECI then refused to bargain with the union, which was forced to file unfair labor practice charges with the Board. The Board issued a complaint and, on April 30, 1984, the Board issued an order finding that ECI had violated the Act and directing ECI to bargain with the union. 270 NLRB No. 36. Eleven months later, in March of 1985, the Court of Appeals enforced the Board's bargaining order. That enforcement order came 21 months after the petition was filed and almost one year after the scheduled completion of the job in question. From a technical standpoint, the union and the Board won a victory. It was a pyrrhic victory, however, and in fact the union won nothing, and the employees never gained the right to be represented by the union of their choice.

The Act, as written in 1935, was structured with the major industries I mentioned earlier in mind. It was intended to work quite well in the normal industrial setting characterized by a stable complement of employees who work for the same employer at the same plant location on a continuous basis. In that situation, there is a reasonable assumption that at the end of the election process, an identifiable employer and an identifiable group of employees will remain for purposes of collective bargaining representation. In the construction industry, the presumption is the opposite.

Soon after passage of the 1935 Act, the NLRB realized that its election procedures were unworkable in the construction industry. The Board recognized that the structural realities of the industry precluded useful elections and also that any attempt to conduct elections on a job-by-job basis would quickly exhaust the financial resources of the Board. So the Board ignored the construction industry from 1935 to 1947. After all, Congress had been concerned with the labor relations instability in those industries struggling with industrial organizing in 1935. The construction industry was not characterized by such instability. Indeed, in 1935, labor relations in the construction industry were far more stable than they are today.

II. The Prehire Agreement

The stability in the construction industry in 1935 and for decades prior was based upon the prehire agreement. The prehire agreement is quite simple in concept. Because of the market realities of the construction industry, employees are rarely continuously employed by the same employer for a substantial period of time. The work force of each employer fluctuates according to his success in securing bids. The more success -- the larger the work force; the less success -- the fewer workers required. At the end of each project, the employer may or may not have another project at which he can offer employment to his current employees. By the same token, when an employer does succeed in a bid award, he must very quickly be able to secure skilled employees. The employees required will be craftsmen of all varieties, upon whose skills the employer must be able to immediately rely. The employer cannot afford to commence each new job with an on-the-job training program to develop skills. The prehire agreement is the only workable collective bargaining agreement in the circumstances of this industry.

The union negotiates, not on behalf of current employees of each employer, but rather, on behalf of the pool of hiring hall registrants who are available to work for the employers who are able to secure work in the area. Everyone on the out-of-work list is a potential employee and, through the union, has a voice in determining the wages and conditions under which he will work if market conditions provide emplovment.

The employer, on the other hand, benefits not only from the availability of skilled workers through the hiring hall, but also from the fact that the prehire agreement provides him with foreknowledge of his labor costs, which assists him in preparing his bid estimate. The hiring hall and the prehire agreement characterized the construction industry long before the Wagner Act was conceived.

Because of these unique characteristics, the NLRB ignored the construction industry from 1935 to 1947. Elections were not conducted in the industry, and prehire agreements, although technically a violation of the Wagner Act because they were signed before the employer had a representative complement of employees, continued as the norm. In its deliberations on the Taft-Hartley Act in 1947, Congress showed no special concern over the Board's treatment of elections and prehire agreements in the construction industry. Congress did, however, exhibit a concern over secondary boycotts in all industries, including the construction industry, and dealt with them in Section 8(b)(4). Accordingly, after the passage of Taft-Hartley, the Board felt compelled to assert jurisdiction over the construction industry for all purposes, including representation elections.

In 1948, the NLRB carried out a pilot program of construction industry elections under the union shop authorization provisions of the Act. The result was that, despite the full cooperation of the unions and employers involved, the election costs were so staggering that the General Counsel ultimately recommended that the Board ignore the statute. Commencing in 1951, and in several sessions of Congress thereafter, bills to amend the Taft-Hartley Act to deal with unique aspects of the construction industry were introduced. These modifications were ultimately enacted as part of Title VII of the Landrum-Griffin Act in 1959.

The legislative history of what became Section 8(f) of the NLRA shows that these modifications were enacted to accommodate the Act to the unique conditions in the construction industry and to preserve the successful pattern of bargaining in the industry. Congress described those unique conditions in these terms:

> The occasional nature of the employment relationship makes this industry markedly different from manufacturing and other types of enterprise. An individual employee typically works for many employers and none of them continuously. Jobs are frequently of short duration, depending on the various stages of construction.

S. Rep. No. 187, 86th Cong., 1st Sess. at 27 (1959). Congress also recognized, again quoting from the legislative history, that:

> A substanital majority of the skilled employees in this industry constitute a pool of such help centered around their appropriate craft union. If an employer relies upon this pool . . . there is no doubt . . . that the union will, in fact, represent a majority of the employees eventually hired.

S. Rep.No. 187, 86th Cong., 1st Sess. at 28 (1959).

In order to permit the continuation of what was plainly the prevailing practice in the construction industry, Congress in 1959 added Section 8(f) to the Act. That section specifically authorized prehire agreements in the construction industry. To the relief of all parties, and primarily the NLRB, the mechanism that had so well served the interest of both workers and employers in the construction industry was at last formally protected by the law. Let me clarify an important point. Section 8(f), while authorizing prehire agreements, preserved employee free choice. It provided that, while prehire agreements were not deemed to violate the Act, such agreements could not serve as a bar to an election petition filed pursuant to Section 9 of the Act. This is a specific safeguard to allow employees to reject any prehire bargaining representative with which they are dissatisfied.

We believe that this is a uniquely appropriate accommodation for our industry. Workers are assured that their unions can negotiate agreements on their behalf which will establish the wages and conditions available to them if the market conditions provide employment. They are also assured that, through those agreements, employers can be required to seek workers through the hiring hall and, accordingly, workers need register with only one source of employment instead of wandering from project to project, day in and day out, seeking work opportunities. At the same time, however, if workers believe that their bargaining representative has not provided acceptable representation, they may file a decertification petition and rid themselves of the union.

The prehire system of collective bargaining, validated by Congress, served the industry well until the early 1970's, when the Board issued a series of decisions which undermined the viability of prehire agreements. In R.J. Smith Construction Co., 191 NLRB 693 (1971), the Board held that employers who enter into prehire agreements were free to repudiate those agreements unless and until the union could establish that it represented a majority of the employer's employees.

In our view that interpretation reflected a total misunderstanding of both the structural realities of the construction industry and the intent of Congress in its 1959 amendments, which were designed to accommodate the statute to those realities. Congress intended that a prehire agreement would be fully enforceable and that an employer who signed a prehire agreement would continue to bargain with the union until such time as the employees voted, through an NLRB election, to change or to rid themselves of their bargaining representative. Congress intended that the decision to change or to eliminate a bargaining representative should be the employees' and not the employer's.

In its recent decision in John Deklewa & Sons, 282 NLRB No. 184 (Feb. 20, 1987), the NLRB revised in several ways its previous interpretation of Section 8(f). The Board held that a construction industry employer may no longer unilaterally repudiate a prehire agreement during the term of the agreement. At the same time, however, the Board held that once the contract expires, the union does not enjoy a continuing presumption of majority status, and the employer is under no obligation to negotiate or adopt a successor agreement. Thus Deklewa, like the Board's previous decisions, leaves the decision to terminate the bargaining relationship in the hands of the employer, rather than in the hands of the employees as Congress intended. Moreover, the Board issued its holding in a case where the union and the employer association had enjoyed a stable 25 year collective bargaining history, and the parties had stipulated that all of the employees in question were union members. The Board also revoked its earlier rules under which a union could convert a Section 8(f) prehire agreement into a full Section 9 agreement. In short, the Board's decision contains one change for the better and several changes for the worse.

The Deklewa case has already been appealed to a U.S. Court of Appeals, and it will no doubt engender a significant amount of new litigation. Thus, the new law under the Board's Deklewa decision is not only unfair, but is also unsettled and may remain so for a period of many years. S. 492 would settle, once and for all, the lawful and enforceable effect of a prehire collective bargaining agreement. Those agreements would enjoy the same binding effect as any other collective bargaining agreements, and they would remain fully enforceable until and unless the workers voted to reject the union. The stability which Congress intended in 1959, by expressly validating prehire agreements, would thus be achieved, while at the same time guaranteeing the right of employee free choice by permitting them to use the Board's election procedures whenever they wish.

The damage that the NLRB has done to collective bargaining in the construction industry goes far beyond Deklewa. Let us assume for the sake of argument that a union can prevent an employer in the construction industry from repudiating an ongoing bargaining relationship. The NLRB has provided this reluctant employer with another opportunity to avoid his collective bargaining obligations and to deny workers the benefits of union representation. The NLRB has allowed employers to avoid these obligations by permitting them to establish double-breasted operations.

III. The Double-Breasted Employer

Double-breasted operations are a phenomenon unique to the construction industry. Although we cannot identify who coined the term "double-breasted" to identify these types of construction operations, it refers to a union construction company and a non-union construction company, both of which are commonly owned and controlled. A dozen years ago, the term was virtually unheard of. Today, it has become an easy way for employers to avoid their obligation to abide by collective bargaining agreements.

The beginning of the tremendous growth of double-breasted operations coincides with, and is in large part attributable to, the NLRB's 1973 decision in a case known as Peter Kiewit Sons' Company, 206 NLRB 562. In that case, Kiewit was bound to a collective bargaining agreement with the Operating Engineers in the State of Oklahoma for the performance of highway construction work. The contract had been in effect for years. In 1972, Kiewit brought a separate corporate subsidiary known as South Prairie Construction Company into the State of Oklahoma for the first time for the purpose of bidding on highway construction work on a non-union basis. South Prairie immediately began to secure such work and refused to recognize and abide by the Operating Engineers' collective bargaining agreement. Kiewit, in the meantime, withdrew from bidding for highway construction work in the State. Kiewit defended its actions on the grounds that it could be more competitive in bidding for highway work on a non-union basis.

Kiewit made no attempt to disguise its purpose. It had decided that it would be more profitable to ignore than to comply with its commitment to perform highway construction work in Oklahoma under a collective bargaining agreement. Accordingly, Kiewit shifted the work previously performed by employees of its union company over to the employees of its non-union company. It does not take a legal scholar to recognize that a system which permits an employer to evade his written agreement by merely setting up a new company to perform the same work on a non-union basis is just plain wrong. That was not what Congress had in mind in 1935 when it guaranteed workers the right to bargain collectively, or in 1959 when it attempted to facilitate collective bargaining in the construction industry.

Nevertheless, the NLRB found that the Act permitted Kiewit to evade his bargaining agreement, primarily because Kiewit and South Prairie independently controlled their own labor relations policies. The United States Court of Appeals for the D.C. Circuit, however, rejected that conclusion. It found that common control of labor relations was not necessarily the critical factor and emphasized the importance of determining whether there was an "arms-length" relationship between the two employers. Operating Engineers Local 627 v. NLRB, 518 F.2d 1040 (D.C. Cir. 1975). Although the Supreme Court upheld that part of the D.C. Circuit's decision, it sent the entire matter back to the Board to determine whether, even if Kiewit and South Prairie constituted a single entity, the employees of each company constituted separate bargaining units. South Praire Construction Co. v. Operating Engineers Local 627, 425 U.S. 800 (1976). Not suprisingly, in its second opinion, the Board decided that even though the two companies constituted a single entity, they were separate bargaining units, and thus reached the same conclusion it had originally reached, i.e., the Operating Engineers agreement did not apply. Peter Kiewit Sons, Inc., 231 NLRB 76 (1977).

The Kiewit case is the landmark case on double-breasting. It is the road map for employers seeking to escape their collective bargaining obligations by establishing non-union operations. The 1973 Board decision contained a statement which at the time was incorrect, but which had become a self-fulfilling prophecy:

> It is not uncommon in the construction industry for the same interests to have two separate organizations; one to handle

> contracts performed under union conditions, and the other under non-union conditions.

206 NLRB at 562.

Today, double-breasting is an openly acknowledged way of evading collective bargaining obligations. In November of 1981, Thomas E. Daley, President of the Associated General Contractors of America, in an interview with the Engineering News Record, described the motivation of double-breasting as follows:

> There is no union contractor I know of that by choice would go open shop for the hell of it. It's a lot easier for him to stay union as long as he can compete . . . but the minute he starts to lose work and his business is threatened, he will go double breasted or open shop, that's all there is to it. He has to.

Thus the employer merely makes a unilateral decision to operate on a non-union basis in order to avoid a collective bargaining agreement. As I said a moment ago, the Kiewit decision contained a self-fulfilling prophecy. In 1973, when the NLRB placed its imprimatur on the practice in the Kiewit case, double-breasting was extremely uncommon. It was believed that such sham maneuvers clearly violated the law. If it was done, it was done in the shadows to avoid publicity and detection. Since 1973, however, the practice has come out of the shadows, and corporations publicly acknowledge their double-breasted status. For instance, a 1981 survey conducted the Engineering News Record disclosed that of the top 400 construction companies 77, or 19 percent, labeled themselves as double-breasted operations. According to a report in the November 4, 1984 issue of Engineering News Record, of the 50 largest contractors by dollar volume, 27, or 54 percent, were operating double-breasted. And, of the 25 top contractors listed in an April 17, 1986 story in the Engineering News Record, 20, or 80 percent, had double-breasted affiliates. Among smaller contractors double-breasted operations are formed more commonly and more easily. That observation has been substantiated by an unlikely ally. In his 1984 book, Open Shop Construction Revisited, Professor Herbert Northrup of the Industrial Research Unit of the University of Pennsylvania's Wharton School, noted that his field interviews revealed many allegations that small contractors often worked double-breasted. He noted that quantification of that phenomenon was not possible, but concluded that there was "little doubt that it is widespread" (pp. 348-49).

We believe that the law should not permit employers to avoid collective bargaining contracts by playing corporate shell games. Certainly, we are not saying that corporations should be denied the ability to form subsidiaries, but we are saying that when subsidiaries are formed to perform the exact same work of a unionized subsidiary, and in the same geographical area, only on a non-union basis, then the company violates the law in refusing to apply the collective bargaining agreement to both operations.

We of the building trades are sympathetic to the need of our employers to remain competitive, and I am proud of the record of the building trades over the last decade in actively pursuing the elimination of non-competitive work practices at the bargaining table. In our view, however, the National Labor Relations Act dictates that the workers and employers must together negotiate solutions to non-competitive aspects of collective bargaining agreements, and the Act should prohibit employers from unilaterally solving such problems through a decision to become double-breasted. We believe that we are entitled to the opportunity to attempt to preserve our jobs through collectively bargained modifications, or concessions if you will, to our collective bargaining agreements, in order to save our jobs. This is an essential principle of collective bargaining. But today, in this industry, that principle does not apply. Employers decide when they are no longer acceptably competitive and avail themselves of the legal solution to this situation allowed to them by the NLRB's decisions.

S. 492 would end these abuses, which have proved to be a major source of disruption and litigation in the construction industry. It would do so by providing that, where there is substantial direct or indirect common ownership, management or control between two or more businesses engaged in the same work in the construction industry, within the area covered by the collective bargaining agreement, all of those entities would be considered a single employer within the meaning of the Act. And, any single employer in the construction industry, as thus defined, would be obligated to apply the terms of its collective bargaining agreement to all other business entities which are part of the single employer within the geographical area covered by the agreement.

Although these amendments would be new to the National Labor Relations Act, the approach is neither radical nor untried. In Canada, for example, at least six provinces have enacted legislation to cover what they term the "related employer" situation. These legislative enactments focus on the need to preserve established collective bargaining relationships, and thus cover the typical case of the double-breasted employer which is encountered so frequently in this country. To our knowledge, these "related employer" provisions have been enacted in Ontario, British Columbia, Alberta, Manitoba, Nova Scotia and Prince Edward Island. There is also a similar provision in the Canadian Labour Code, for federal (inter-provincial) employers (Section 133).

The Ontario provisions, Section 1(4) and (5) of its Labour Code are particularly instructive. Section 1(4) provides that, when the Ontario Labour Relations Board determines that several associated or related businesses are carried on "under common control or direction," the Board is empowered to treat the business entities or individuals involved "as constituting one employer for the purposes of this Act." Section 1(5) goes even further and deals most effectively with the typical problem of proof which is found in these situations. That section provides that when an allegation has been made that more than one business or individual are under common control or direction, the "respondents [the charged employers or individuals] shall adduce at the hearing all facts within their knowledge that are material to the allegation." This provision shifts the burden of producing the relevant evidence to the parties who have control over it, namely, the employers themselves.

S. 492 would thus provide protections to American workers in this industry similar to those which are already guaranteed to many Canadian workers.

IV. The Objections to the Bill

During 1986, as H.R. 281 moved through the House, and as action on this bill was anticipated in the Senate, a number of objectives were advanced against the bill. Almost all of the objections were specious and some were downright deceitful. I want to put some of those phoney claims to rest today.

First and foremost, this bill does not legalize common situs picketing. That claim is an intentionally misleading effort to distract attention from the current inequities in the law affecting the construction industry that are addressed by this bill. Under Section 2(a) of the bill, two business entities must be engaged in the same kind of work, e.g., electrical, plumbing, etc., in order to be considered a single employer. A general constractor and one of its subcontractors, as a rule, do not engage in the same work. Moreover, last year in the House, the Committee report on H.R. 281 specifically stated that the bill does not in any way address the issue of common situs picketing, and that statement was repeated on the floor of the House during the debate over the bill. And this year, in order to remove any lingering doubt about this question, a proviso has been added in the House, with our full support, specifically stating that a contractor-subcontractor relationship is not sufficient to create single employer status. For the same reason, H.R. 281 now refers only to the "perform[ance]" of work by the two entities; the previous additional reference to one entity "supervising" the work of the other has been deleted.

Second, some persons have claimed that the bill may affect the labor practices of non-construction businesses. That claim, too, is without merit. Section 2(a) of the substitute House bill states expressly that the bill applies only to employers "primarily engaged in the building and construction industry," the same language used in Section 8(f). The bill also states that only business entities that perform the same work as that described in the collective bargaining agreement of the unionized entity can meet the bill's definition of a single employer. A manufacturer and a construction contractor clearly do not perform the same work.

Third, it has also been said that the bill may extend to all operations or projects of employer, wherever they may be located. That claim misses the fundamental point, that a single employer must apply the terms of its collective bargaining agreement only to his employees "performing the work described in the collective bargaining agreement within the geographical area covered by the agreement." The contract is the key. It is the employer and the union who voluntarily set the boundaries of their agreement, and this bill merely enforces their agreement. Only where an employer has signed a nationwide labor agreement would the bill require its application to that employer's double-breasted operations anywhere in the United States. But national agreements represent only a miniscule percentage of collective bargaining agreements in this industry. A survey taken last year among twelve of the largest affiliates of this department revealed a total of approximately 9,500 local agreements and only 185 national or multi-state agreements, the latter representing under two percent of the total number of agreements. And even that percentage is artificially inflated, as dozens (or even hundreds) of individual employers may sign or assent to a single collective bargaining agreement between a local union and a multi-employer association. Finally, and for the same reason, Section 2(a) of the substitute House bill drops the previous reference to work within the "same or different geographical areas", and uses the narrower and more precise reference to work performed "within the geographical area covered by" the collective bargaining agreement of the unionized entity.

Fourth, some individuals still claim that this bill takes away the right of employee free choice that exists under current law. That is simply not true. Rather it is the current law under which employers -- rather than employees -- have the right to terminate a bargaining relationship, that deprives employees of their free choice. Congress intended that such a decision should be made solely by the employees, and S. 492 is true to that intent. There is a specific proviso to Section 8(f) that allows workers covered by prehire agreements to obtain Board-conducted elections to oust their union, without regard to the contract bar rules that apply in other industries. That proviso is retained in this bill. I cannot help but observe in this regard that the fraudulent nature of the concern for employee rights professed by management lawyers and employer associations should be transparent to all. These employer attorneys and associations are not fighting in any way, shape or form to preserve the principle of employee free choice. Employees do not benefit when their employers abandon a collective bargaining relationship; in fact, they usually suffer.

Fifth, various lists of cases have been produced to support the claim that construction unions and employees are adequately protected by present law. Each time such a list has been produced, we have analyzed that list, noting in some instances that cases have been included involving employers who were not even in the construction industry, and that many of the cases involved issues different from those addressed by this bill. But the major point I'd like to make about these lists is that, considering the fact that thousands of double-breasted operations exist today, it proves our point when the opponents of this legislation can muster only a list of 20, 30, or 40 cases in which unions have succesfully fought the erosion of their rights over a period of more than 20 years. Also, this Committee should know that many of the very employer groups and attorneys who argue that the present law is adequate, are at the same time producing "how-to" manuals and seminars to educate employers on how to use the present law and set up double-breasted operations. We can expect, therefore, that unions will be successful in even fewer of these cases in the future.

V. Conclusion

Although Congress enacted the NLRA to permit employees to bargain collectively through representatives of their own choosing, and amended the Act in 1959 specifically to permit construction industry employees to bargain collectively in accordance with existing practices in the industry, the NLRB in the last dozen years has to a very large extent taken that right away from construction workers. The result, I am afraid, is that the system of collective bargaining, which has been the basis of stability in the construction industry for over half a century, has been seriously undermined. Plainly, this is not what Congress intended in 1935 or in 1959, and we do not believe that it is what Congress intends today.

In short, it is our position that the NLRB should not be permitted to deprive workers in this vital industry of the rights which Congress expressly granted to them. To allow an administrative agency to subvert the clear intent of Congress by administrative fiat undermines the collective bargaining process and the stability of labor relations in the construction industry. We do not seek a broad overhaul of the National Labor Relations Act; nor do we propose any radical new approaches. S. 492 has a narrow and specific focus, namely, correcting the damage that has been done by erroneous NLRB interpretations of those provisions of the Act affecting construction workers. The bill is not only necessary to restore stability to construction industry labor relations, it is both fair and just. It provides only that any party which enters into a collective bargaining agreement, under which he received substantial benefits, must live up to that agreement and continue to bargain until the employees decide otherwise. And it is equally fair and just in its provision that employers may not evade those agreements through the sham device of double-breasting.

Accordingly, we urge the speedy passage of S. 492.

Thank you.

Senator **METZENBAUM**. Mr. Georgine, Representative Clay has offered a substitute amendment to H.R. 281, the House bill on double-breasting. Would you or your counsel please describe any major changes involved in the substitute and also your position on those major changes, and do you support the Clay bill?

Mr. **GEORGINE**. Well, there were objections raised to the bill by the opponents, smoke clouds were raised, and there was language put in to H.R. 281 dealing with the question of whether or not nonconstruction employers would be affected by the bill, and there was language put in that would clarify—actually it is the same language that appears now in 8(f)—would clarify what an employer is, what a single employer is, and that was one of the changes.

Another was the question that was raised about situs picketing, and that this was situs picketing revisited and that we were going to get new additional picketing privileges that we did not now have, and language was put in to make that perfectly clear that situs picketing was not any aspect of this bill and that it did not enlarge our picketing privileges.

There was some question with regard to the geographical area which was affected by the language in the bill, and there was an amendment put in that clearly spelled out that the geographical area provided for in the collective bargaining agreement was the only area that would be affected.

Lastly, there was some question about how to define common management or control of the companies, and there was language put in with regard to a substantial degree test—three tests, as a matter of fact, that would determine whether or not there was substantial control of management.

So those are the changes. That is in a layman's language. If you want a technical explanation, Larry would be glad to do that.

Senator **METZENBAUM**. No, I think it is clear.

Mr. Georgine, everyone seems to agree that Congress should curb sham double-breasting operations. The ranking member just indicated his own view on it. Mr. Rosenfeld has indicated the Department of Labor's view on it. My question to you is, is it possible we could draft a piece of legislation that would solve the problem by making it illegal for any employer to create, cause to be created, be involved in, participate in, whatever, any operation in which he has a financial interest—and using the appropriate language—where he has a union contract and then is involved in this sham or non-union operation as a part of his corporation?

Senator Quayle has made it clear that in his view it is already an illegal act. Mr. Rosenfeld indicated that they consider it to be illegal and improper. That being the case, instead of opening up the National Labor Relations Act, the Chair is thinking that there may be another way to skin the same cat and achieve the same objective and not rock as many boats as this proposal has appeared to do.

Mr. **GEORGINE**. Well, if you are asking me is there a way, I guess smarter men than I might be able to figure out a way. We have not been able to figure out a way, and that is why we were seeking this relief. Actually, this is what we are looking for here and what you have in the bill I think takes care of the situation.

I think what it does is confirms what the Congress intended the law to be. We did not have any problems for many years after the law was passed, and it was not until people started going around the backdoor to try to avoid their contractual obligations that we did have problems, and it was not until the NLRB erroneously interpreted the law that we had problems.

So I think the only solution is to have this statute clearly interpreted as we are attempting, as you are attempting to do now.

Senator METZENBAUM. I want to say to you that we want to work with you, but I think that along with the ranking minority member and your people and the Department of Labor, I want to at least explore another avenue of approach to achieve the same objectives without opening up what I consider to be another whole question of situs picketing. That is not a part of this bill, but if somebody thinks it is, that makes it that much more difficult to enact into law, and the Chair indicates that we are at least going to explore why a much simpler statute could not achieve the same objective. I would guess that if it achieved the same objective you, representing construction trade unions, would be perfectly comfortable with it.

Mr. GEORGINE. Mr. Chairman, if you could find some way to achieve the same objective without doing what we are doing, I would support it wholeheartedly. All we are looking for is fairness.

Senator METZENBAUM. For the man who will probably author the legislation and draft it for me, I call upon Senator Quayle. [Laughter.]

Senator QUAYLE. With that introduction, let me try to follow the Chairman's line of thought, because I think it is a very good one. He and I were just discussing this with Mr. Rosenfeld and also privately.

I have no problem—and I have told you this—I have no problem with going after and making sure that contracts that have been negotiated are in fact not circumvented by some sort of sham operation, by creating this corporation to avoid the collective bargaining responsibility that they entered into. I have absolutely no reluctance whatsoever to enforce that. And I think that perhaps—and that is what I tried to get from the Department of Labor's witness, he did not have any jurisdiction over the NLRB, but maybe they are not enforcing it and maybe there is something, as the Chairman says, that they can make stronger language and give them the possibility to enforce that.

My objective would be to find perhaps a more effective way to making sure those collective bargaining responsibilities are upheld, but I myself believe that you can in fact have a legitimate, legal double-breasted company. I think that is a possibility.

Now, do you agree with me that under your objectives that you could in fact have a double-breasted company if they operated under the law as perhaps the consensus might be developed?

Mr. GEORGINE. I cannot agree that you could have one company or one management owning two companies in the same geographical area in the construction industry and have them operate fairly and honestly and have workers get a fair shake. So the answer to your question is no, I do not think I can see a way—there is no way that I can see in my small pea brain.

Let me just say that the construction industry is a very complicated industry.

Senator **Quayle**. It is very unique, and that is why I asked. Many of the labor laws have specific exemptions and inclusions that reflect on the construction industry. Now, you are saying that you could not see it perhaps in a local area or district, although I would tend to perhaps think maybe we could. What about, say, 100 miles away or 500 miles away, could you have a union shop in one place and——

Mr. **Georgine**. That is provided for in the law, in the proposed law that is provided for.

Senator **Quayle**. So in your recommendation, your objective would be to prohibit any double-breasted companies, is that not the objective?

Mr. **Georgine**. Yes, where it would have the effect of making a collective bargaining agreement null and void, and that is what would happen.

Senator **Quayle**. Okay. Now, if that is the case, Mr. Georgine, if it is having the effect of declaring the collective bargaining agreement null and void, then in essence you are saying—at least I am deducing from that—that if you could have a double-breasted company that would not provide for that subversion or getting around the collective bargaining responsibility, that would be okay. You see, that is what I am striving for, because I personally believe that you could and that you should.

You see, if your objective—the law right now reads—and this is why we would be changing the enforcement of it—Mr. Chairman, I think we would be changing the actual law right now. The law right now provides for legitimate double-breasted companies. My objective, is to get better enforcement of those double-breasted companies that are operating, perhaps, illegally and operating to circumvent collective bargaining agreements. So your objective is to basically change the current law, because current law, do you not agree, allows for double-breasted companies?

Mr. **Georgine**. Well, I think—that is a technical question.

Senator **Quayle**. It does.

Mr. **Georgine**. The Act does not, but there well might be decisions that if you talk about——

Senator **Quayle**. I do not want to get too detailed on this. I think it is clear, is it not, that double-breasted companies are legal?

Mr. **Cohen**. Let me answer the question. May I back up one step and then get to the last point.

Senator **Metzenbaum**. That is all right. Go ahead.

Mr. **Cohen**. It is our position that within a given geographical area there is no such thing as a legitimate double-breasted contract, and the reason for that is——

Senator **Quayle**. That is your opinion, but what about the interpretation of the NLRB and the Court says that there can be. Is that not true?

Mr. **Cohen**. And they have so held even in the case of obvious shams, the classic example being the Peter Kiewit case, which I think everyone cites, it is certainly cited in Mr. Georgine's testimony—where a union company doing highway construction in Oklahoma was taken out of that business by a parent, a new non-union subsidiary was reactivated to do the very same work that the union company had been doing under its collective bargaining agreement, they made no pretense as to why they were doing that, and yet the Board, because of its unrealistic test today, found that was still lawful.

Mr. GEORGINE. That was lawful and that is the problem.

Senator QUAYLE. Okay.

Mr. COHEN. And that was a classic sham operation.

Senator QUAYLE. Okay. As I said, I am trying to delineate my—I come from a basic premise that I think there are—we are going to hear some testimony later on, particularly from the CBI Industries—and I hope you get a chance to read that—I think a very legitimate, well-respect company, and he is going to come and testify, on how they run a union shop on one hand and a non-union shop on the other hand, and they do it in a very fair and I think certainly a very legal way.

Now, I have personally no reservations about that kind of situation. It is legal and I think it is proper. Now, you can give examples, and you have got a lot of them. I do not like the idea that those examples exist, and it is my desire to say is there a better way to get enforcement against it. But what I am getting from you is that your objective—and I think this is what we need to understand here—is a change of the statute as has been interpreted by——

Mr. GEORGINE. No, no, no. The statute has been interpreted as——

Senator QUAYLE. The law now says clearly that you can have double-breasted companies, and your basic objective is to say that you cannot have a double-breasted company.

Mr. GEORGINE. Senator, if I may, the only way you can really respond to that—and you have to understand that, you have to understand what goes on in construction and what the practical effect of certain actions are.

You have Contractor A in an area and he has a collective bargaining agreement that provides of "X" amount of money, wages, and certain conditions and so on and so forth, and he has to bid under the terms of that agreement.

Now, to have another company that can subvert that contract, that can bid at reduced wages, at different conditions, for the same kind of work——

Senator QUAYLE. If he subverts the——

Mr. GEORGINE [continuing]. Owned by the same guy and operated by the same guy, using the same equipment, using the same offices and everything else——

Senator QUAYLE. If it subverts the collective bargaining contract or responsibilities, it is illegal under the current law and perhaps there is a better way to get enforcement against that, and I have no objections to that. The thing that I am concerned about is the objective of prohibiting double-breasted companies.

Let me go to one other question that concerns me. I just need to bring this out. Let me ask you, can double-breasted companies be eliminated now under the collective bargaining process.

Mr. GEORGINE. I think not. The very clause that you raised, Senator Quayle, in your opening remarks has been challenged by the General Counsel of the NLRB.

Senator QUAYLE. I do not think that is the case. I think that the fact is—and this is a very interesting point—if you do not think you can get it in the collective bargaining process, now I think I would ask you this: Would you change your opinion of this legislation if you found out that you could get it under the collective bargaining process now, that you could outlaw and prohibit double-breasted companies by the collective bargaining process?

Mr. GEORGINE. The final——

Senator QUAYLE. If you could, would you be willing to take a second look at that?

Mr. GEORGINE. If it were possible, but I do not think it is possible and let me tell you why I do not think it is possible.

Senator QUAYLE. Well, do you have any——

Mr. GEORGINE. In collective bargaining, you negotiate and you come to agreement, you actually come to agreement. If I were an employer who wanted to have the flexibility of having two companies, one to undercut the other whenever I wanted to, one to set up this phony set of competition, then I would never agree to contract language that would prohibit me from doing that.

Senator QUAYLE. Okay. If I can show you that it is possible to negotiate in the collective bargaining process to prohibit double-breasted companies, would you be——

Mr. GEORGINE. Well, if you can show me that, if you can show me something I do not think is possible.

Senator QUAYLE. Okay. Let me just show you. You have got to go back and look at it, this agreement, the Boston District Council of Carpenters, and let me just read what they got in their contract. It says wherein the employer has either directly or indirectly a significant degree of ownership, management or control of the terms and the conditions of this agreement shall be applicable to all such work, and that contract—I am going to give it to you, I have it all here, I want to make sure that you get this, because what it shows to me—and maybe this is a new point of information for you—shows to me that you can in fact achieve the prohibition of double-breasting in the collective bargaining process.

Now, there is one that has been achieved. It is not saying that it can be done, it has been done.

Mr. COHEN. There is only one problem, Senator, and that is that according to the General Counsel of the National Labor Relations Board that clause is unlawful. Those clauses are not any new development. They go back approximately ten years when we drafted them. They are now under attack and at this very moment the legality of them is before the National Labor Relations Board.

Senator QUAYLE. Are you familiar with the Manganaro case?

Mr. COHEN. Vividly. [Laughter.]

Senator QUAYLE. In this case it says that they could in fact enforce and have as a collective bargaining issue the exact prohibition on double-breasting which you desire.

Mr. COHEN. That is the decision of the administrative law judge which is presently on appeal to the Board. I think any labor lawyer in this field knows that that will ultimately be resolved two, three, four years from now by the Supreme Court.

Senator QUAYLE. Do you know what might be a possibility, Mr. Chairman—we ought to take a look at this decision—we might want to codify and make sure explicitly that you have the right in the collective bargaining process to get the elimination of double-breasting. Now, I agree with this decision——

Senator METZENBAUM. I want to say to my colleague that I think that would open the door for more labor strikes because I think it means going back and reopening contracts and fighting to get that clause in. I like the earlier position he enunciated, which is supported by the Department of Labor, and that is if the intent and the effort is made to circumvent the collective bargaining obligations by being a party to forming a separate entity, that should be illegal and perhaps we have to strengthen the law. I think that is a realistic approach and I hope to explore that subject with him.

Having said that, our time is rapidly running out and——

Senator QUAYLE. Let me just conclude. You know, I hope that the line of discussion here is in fact that I think it is achievable, I have no problems with it, and if in fact it can be possible in the collective bargaining process, I think that would be helpful to what you want and it may be in fact that any kind of codification of this decision may be helpful.

Thank you, Mr. Chairman.

Senator METZENBAUM. Senator Matsunaga?

Senator MATSUNAGA. Thank you, Mr. Chairman.

Mr. Georgine, some problem arises because of the interpretation given by the courts and the NLRB which would permit double-breasting for purposes of subverting union contracts, does it not?

Mr. GEORGINE. Well, by the NLRB specifically.

Senator MATSUNAGA. The NLRB, but by court decisions as well. So what we are trying to do here is to amend the statute so that what truly is illegal under the intent of the law should be rendered illegal, is it not?

Mr. GEORGINE. That is exactly right, Senator.

Senator MATSUNAGA. Thank you, Mr. Chairman.

Senator METZENBAUM. Thank you very much, Senator.

Senator Stafford?

Senator STAFFORD. Thank you, Mr. Chairman. Mr. Chairman, you have proved unusually adept this year thus far in finding compromises that can allow us to find legislation that we can all support. I encourage you to proceed here and I know you will. I hope you will find a way that can solve this problem simply, without reopening any old wounds.

The bill that is under consideration today seems to me to be fairly easy to understand, with one exception. I would like to ask your general counsel, Mr. Georgine, if he could advise me on this one point and that is on the second page of the bill, in line 17, the words "geographical area" appear, and later in line 21, in reference to another part of section 8, it says "by striking out geographical area in clause 4, and inserting in lieu thereof the following 'geographic area.' " What is the significance, I would like to know, of changing that from "geographical" to "geographic"?

Mr. COHEN. I think the answer is none, Senator. The change was made because of what follows there is the new clause inserted thereafter.

Senator STAFFORD. I see.

Mr. COHEN. But the difference between "geographic" and "geographical" is non-existent.

Senator STAFFORD. That is the way it appeared to me, but I thought there may be some deep meaning here that escaped a simple lawyer from Vermont.

Mr. COHEN. If so, it has eluded us as well.

Senator STAFFORD. Thank you.

Thank you, Mr. Chairman.

Senator METZENBAUM. Thank you.

Thank you very much, Mr. Georgine, and those accompanying you.

Our next witness panel consists of Mr. Robert Farrington, Secretary-Treasurer, Ohio State Building and Construction Trades Council, Columbus, Ohio—obviously, my own State—Mr. Charles E. Key, Business Manager and Financial Secretary-Treasurer of the North Georgia Building and Construction Trades Council, Atlanta, Georgia, and John Gast, Jr., President, Contractors Welding of Western New York, Inc., of Grand Island, New York.

We are happy to have all of you with us. Mr. Farrington, you are first.

Mr. Farrington, do you want to proceed?

STATEMENTS OF ROBERT Y. FARRINGTON, EXECUTIVE SECRETARY-TREASURER, OHIO STATE BUILDING AND CONSTRUCTION TRADES COUNCIL; CHARLIE E. KEY, BUSINESS MANAGER, NORTH GEORGIA BUILDING TRADES COUNCIL; AND JOHN GAST, JR., PRESIDENT, CONTRACTORS WELDING OF WESTERN NEW YORK, INC.

Mr. FARRINGTON. Good morning, Senator. Prior to commencing, on behalf of the members of the Ohio State Building and Construction Trades Council, we also want to extend to you personal birthday wishes and we are certainly glad to be here and extend those wishes on behalf of the members.

Senator METZENBAUM. I am expecting them to provide me with a birthday gift in November 1988. [Laughter.]

Mr. FARRINGTON. Absolutely. We understand, Senator. We understand. We always have. Thank you.

Mr. Chairman and members of the Subcommittee, I would like to tell you about a situation which arose in Columbus which demonstrates just what double-breasting does to individual workers in the collective bargaining system.

In the early 1980s, the Setterlin Company was the premier general contractor in Central Ohio. The company was family-owned and had maintained collective bargaining relationships with its employees for over fifty years. The company had been the traditional leader among the contractors in collective bargaining, and company officials sat on almost every important negotiating committee during the 1960s, 1970s and early 1980s. The company had participated in the MOST Program, a well-recognized labor-management cooperation program in the Central Ohio area.

Throughout this period, all of the company's craft employees, most of its supervisors, and even some of its top management, were union members. These individuals had exercised their right to negotiate the terms and conditions of employment on a collective basis with the company. The company, in turn, exercised its right to bargain in combination with other employers in a multi-employer bargaining group.

The early 1980s were very tough times for Central Ohio. Building slowed dramatically. Highway construction was drastically curtailed by the impact on the State treasury of 20 to 30 percent unemployment in our State's industrial cities and counties. The local construction workforce was flooded with unemployed factory workers, farm youth, and traveling workers from other cities desperate for work. These folks had no longterm commitment to the construction industry. They were hungry and frightened enough to work almost any job at almost any wage, no matter how unsafe the job was.

These workers were generally channeled into light commercial construction, but their impact on area wages was most dramatic among the unorganized construction workers employed by larger non-union concerns. These individuals experienced a drop in wages from near-union scale to lows of $5 to $7 per hour for some skilled trades. The non-union employers——

Senator METZENBAUM. Lower than what?

Mr. FARRINGTON. A drop in wages from near-union scale—we are talking of a non-union construction worker—experienced a drop in wages from near union-scale level to lows of $5 to $7 per hour for some skilled trades. This is the non-union sector we are talking about.

The non-union employers did not pass the concessions on to their customers. A review of the bids at the time indicated that the non-union contractors were only lowering enough to underbid the union competitors while pocketing the difference. The Setterlin Company was among the companies which lost bids to these non-union companies.

In that situation in the early 1980s, the Setterlin Company had two choices: As an industry leader, they could meet the problem head-on at the negotiating table and engage in the "give and take" at the table to obtain economic concessions, or they could hide from the problem by creating a clandestine second company. The Setterlin Company took the second option and formed Kenny Construction Company.

Setterlin then began diverting resources and expertise to Kenny in order to establish Kenny in the marketplace. As Setterlin diverted more and more work to Kenny, long-time Setterlin employees were forced to give up their chosen bargaining representatives in order to work for Kenny. Setterlin even became so brazen as to advertise Setterlin as their organized entity and Kenny as their "merit shop" non-union arm.

In 1982, several local unions sued Setterlin and alleged that Kenny and Setterlin were a "single employer" within the meaning of the labor cases. After about six months, Setterlin agreed to settle the dispute by folding Kenny after existing jobs were completed. Within weeks of the settlement, Setterlin created another non-union company, Sigma Construction Company. Unlike its predecessor, Sigma was carefully created to avoid the legal standards for an "alter ego" or "single employer" determination.

By 1984, Setterlin had been reduced to a shell from the diversion of resources and employees to Sigma.

Senator **Metzenbaum**. Would you please conclude your remarks.

Mr. **Farrington**. In conclusion, we have seen in Central Ohio, and we just cited one example and there are many examples to cite, a company that has been traditionally an old-line company, went the double-breasting route and for the mere profit motivation—I call it greed—and the deterring loss to rights and representation and wages of our organized members.

In conclusion, we would ask support for S. 492.

[The prepared statement of Mr. Farrington, with an amendment, follows:]

STATEMENT OF ROBERT Y. FARRINGTON, EXECUTIVE SECRETARY-TREASURER OF THE OHIO STATE BUILDING AND CONSTRUCTION TRADES COUNCIL

BEFORE THE SUBCOMMITTEE ON LABOR OF THE COMMITTEE ON LABOR AND HUMAN RESOURCES OF THE UNITED STATES SENATE

A STATEMENT IN SUPPORT OF S. 492

Mr. Chairman and Members of the Subcommittee:

My name is Robert Y. Farrington, and I am an electrical worker. I am also Executive Secretary-Treasurer of the Ohio State Building and Construction Trades Council. I have previously served as Executive Secretary-Treasurer of the Columbus Ohio Building and Construction Trades Council and as a Business Agent of International Brotherhood of Electrical Workers Local Union No. 683. Thank you for the privilege of appearing before you today to discuss the damage done to our American system of collective bargaining by the practice we call double-breasted contracting.

I would like to speak to you today not solely as the representative of 100,000 Ohio men and women in the construction trades. Instead, I would prefer to speak as one who is committed to our American system of collective bargaining and is very concerned about the impact of double-breasting upon all employees, union and non-union.

In 1979, I temporarily put down my tools as a journeyman wireman and picked up the clipboard, business suit, and telephone book: the tools of the union representative. During my last few years working with the wireman's tools, I had worked in such diverse places as Saudi Arabia, the North Slope of Alaska, and in Columbus, Ohio. These experiences -- particularly those in the Middle East -- convinced me of the wisdom and foresight of the United States Congress in 1935 and thereafter, when your predecessors decided that support for collective bargaining was to be the benchmark of labor policy in our country not the class warfare or facist policies other nations had adopted.

Double-breasting is a tool that is ideally suited to undermine collective bargaining and denigrate the freedoms guaranteed to American workers in Section 7 of the National Labor Relations Act. I would like to tell you about a situation which arose in Columbus which demonstrates just what double breasting does to individual workers and the collective bargaining system.

In the early 1980's, the Setterlin Company was the premier general contractor in Central Ohio. The Company was family-owned and had maintained collective bargaining relationships with its employees for over fifty years. The Company had been the traditional leader among the contractors in collective bargaining, and Company officials sat on almost every important negotiating committee during the 1960's, 1970's and early 1980's.

The Company had participated in the MOST Program, a well-recognized labor-management cooperation program in the Central Ohio area.

Throughout this period, all of the Company's craft employees, most of its supervisors, and even some of its top management, were union members. These individuals had exercised their right to negotiate the terms and conditions of employment on a collective basis with the company. The Company, in turn, exercised its right to bargain in combination with other employers in a multi-employer bargaining group.

The early 1980's were very tough times for Central Ohio. Building slowed dramatically. Highway construction was drastically curtailed by the impact on the state treasury of 20-30% unemployment in our state's industrial cities and counties. The local construction work force was flooded with unemployed factory workers, farm youth, and traveling workers from other cities desperate for work. These folks had no long-term commitment to the construction industry. They were hungry and frightened enough to work almost any job at almost any wage, no matter how unsafe the job was.

These workers were generally channeled into light commercial construction, but their impact on area wages was most dramatic among the unorganized construction workers employed by larger non-union concerns. These individuals experienced a drop in wages from near-union scale to lows of $5 to $7 per hour for some skilled trades. The non-union employers did not pass the concessions on to their customers. A review of the bids at the time indicated that the non-union contractors were only lowering enough to underbid the union competitors while pocketing the difference. The Setterlin Company was among the companies which lost bids to these non-union companies.

In that situation, in the early 1980's, the Setterlin Company had two choices. As an industry leader, they could meet the problem head on at the negotiating table and engage in the "give and take" at the table to obtain economic concessions -- or -- they could hide from the problem by creating a clandestine second company. The Setterlin Company took the second option and formed Kenny Construction Company.

Setterlin then began diverting resources and expertise to Kenny in order to establish Kenny in the marketplace. As Setterlin diverted more and more work to Kenny, longtime Setterlin employees were forced to give up their chosen bargaining representatives in order to work for Kenny. Setterlin even became so brazen as to advertise Setterlin as their organized entity and Kenny as their "merit shop" non-union arm.

In 1982, several local unions sued Setterlin and alleged that Kenny and Setterlin were a "single employer" within the meaning of the labor cases. After about six months, Setterlin agreed to settle the dispute by folding Kenny after existing jobs were completed. Within weeks of the settlement, Setterlin created another non-union company, Sigma Construction Company. Unlike its predecessor, Sigma was carefully created to avoid the legal standards for an "alter ego" or "single employer" determination.

By 1984, Setterlin had been reduced to a shell from the diversion of resources and employees to Sigma. During collective bargaining negotiations, Setterlin refused wage concessions ranging from 20% to 36% offered by the basic trades unions if the Company would agree to honor its employees' rights and only operate a single company. After weeks of working without a contract, Setterlin's few remaining employees struck when the Company announced it would cease contributing to the employees' jointly trusteed fringe benefits funds.

Replacement employees were quickly hired; and almost immediately, Sigma -- the subterfuge company -- stopped bidding work. The Company had effectively replaced its work force and retained only those employees who were willing to forfeit their rights to collective bargaining in exchange for a job.

Since 1985, a significant recovery has occurred in the Columbus area construction industry. Many trades are at full employment. Many companies have as much work as they can adequately handle. Nevertheless, companies continue to create double-breasted subterfuge companies. Even in good times, companies find double-breasting an irresistible narcotic.

The Setterlin example points out just how dangerous double-breasting is to labor market stability and collective bargaining. When double-breasting involves transferring employees, the employee's Section 7 rights are ridiculed by requiring the employee to "work union" one day and "work non-union" the next. Even the most vigorous supporters of double-breasting must concede that employees don't change their beliefs about unions on a daily basis. Unrestrained double-breasting robs from the employee his or her right to decide and gives it solely to the employer.

Even if the opponents of Senate Bill 492 ignore the individual's rights, they must acknowledge the damage double-breasting does to the labor market. Collective bargaining, like many other processes in our free enterprise system, is not easy. Both employer and employee representatives must be motivated and dedicated to ensure the hard bargaining necessary to make collective bargaining efficient. A double-breasted contractor has no incentive to bargain responsibly if he can avoid the contract by use of the non-signatory entity.

The vigorous market in Columbus has temporarily sustained collective bargaining relationships. Although my account of the Setterlin Company example is not so dramatic as those of other cities, we have no illusions that we will avoid the catastrophic situations of Cincinnati and Atlanta when the present boom ends. Only through the passage of S. 492 or similar statutes will the Columbus market avoid the chaos which has struck the construction industry in Cincinnati through pervasive double-breasting.

I have attached two exhibits to my written testimony. Exhibit A contains lists of major contractors with one or more subterfuge companies in the Columbus and Cincinnati areas. Exhibit B contains news stories from Cincinnati of collapsed buildings resulting from the poor workmanship and materials of two subterfuge companies. The cost of their substandard work will be paid by every owner and contractor through higher insurance premiums and building costs.

Although their work may be shoddy, the legal and corporate structures of double-breasted companies are increasingly sophisticated. The structure of earlier companies, like Kenny, was so loose that a challenge was possible under the NLRB "alter ego" and "single employer" standards. Second generation companies, like Sigma, have been organized and operated according to careful strategies aimed at avoiding the NLRB technical criteria while providing all of the features of double-breasting to the employer.

S. 492 provides the vital stability and good faith required of collective bargaining by requiring those who enter into contracts to honor them. S. 492 provides substantial protection for individual employees by ensuring that their choice of a bargaining representative will be honored by their employer. S. 492 also ensures that the rights of the individual employee will be protected by reiterating the right of the employees to petition for a decertification election. Finally, S. 492 ensures that the courts and the National Labor Relations Board remain faithful to the fundamental purpose of the American labor law and policy: support for collective bargaining as the tool for workplace cooperation.

The bill before you today is vitally needed and is worthy of your support.

Thank you.

EXHIBIT A:

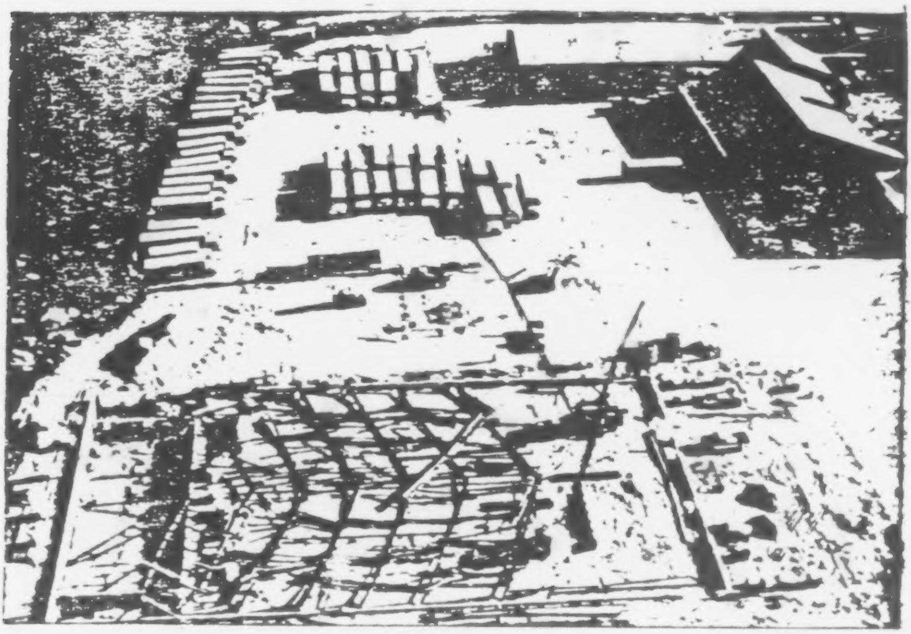
PARTIAL LIST OF CONTRACTORS WITH SUBTERFUGE OPERATIONS IN THE CINCINNATI AND COLUMBUS AREAS.

J.A. Guy Mechanical Co.
Reeb Mechanaical Co.
Central Ohio Sheet Metal Co.
Kirk Williams Sheet Metal Co.
Divine Construction Co.
Turner Construction Co.
B.G. Danis Co.
United Management Co.
Contract Flooring Co.
Greendale Systems, Co.
Anderson Glass Co.
Carlisle Co.
Aggressive Co.
C. V. Mascher Co.
Neyer Co.
Frank Messer & Sons Construction Co.
Universal Co.
Hillsmith Co.
South Texas & Lone Star Drywall Co.
Hummel Building Co.
H.B. Jacob Co.
Len Jacobs & Co.
Carnevale Tile and Terrazzo Co.
Lafe Hauer Inc.
Siemering Tile Co.
Chronis Co.
Ford Development Co.
Bamback & Vest Co.
Brummerman Co.
Cincinnati Floor Co.
P.R. Dake Co.
Flannery & Ezz Co.
J. & F. Harrig Co.
Hillsmith Co.
Richard Huseman Co.
J & A Interiors Co.
Robert Klemsch Co.
Maury Daniels Co.
Ryberg Co.
Southern Drywall Co.
Southerly Construction Co.
TCS Construction Co.
Valley Interiors Co.
Cousin Co.
Tiller Construction Co.
Arnold Beck Co.

Duckworth Mechanical Co.
Peterson Co.
Silverbow Co.
Arga Co.
McCarthy-Farrell Co.
Vesta Construction Co.
Dugan & Meyers Co.
Ohio State Management Co.
Wilson Floors Co.
Graf & Sons, Inc.
Ceco Corporation.
Ray Evers Co.
Debra Co.
Monarch Co.
Schmacher/Dugan Co.

EXHIBIT B

F



The Cincinnati Enquirer/John Curley

Two workers escaped with only minor injuries after the steelwork for a new gymnasium at the Landmark Baptist Temple School in Evendale collapsed Thursday.

Workers escape serious harm as gym's steelwork collapses

BY MIKE TURMELL
The Cincinnati Enquirer

Two workers who rode a falling beam to ground when the steelwork for a new gymnasium collapsed Thursday at Landmark Baptist Temple, Evendale, escaped with minor injuries.

At least two other workers fled the falling steel as it collapsed near them on church property in the 1600 block of Glendale-Milford Road about 3 p.m.

John Shoberg, 25, of Union, Ky., was treated at Bethesda North Hospital and released, the hospital reported. His brother, Jim Shoberg, also of Kentucky, refused treatment for minor injuries, Evendale Police reported.

The brothers were among six employees of the Evers Equipment Co. installing the steelwork and were atop the same steel beam at the west end of the building when the whole structure collapsed, said job superintendent Harold Nicely, 45, of Reading. The beam fell more than 20 feet to the ground.

Nicely and Ed Odle, 29, Sharonville, both working for the church, were installing anchor bolts along the northeast side of the building when the steel beams began moving.

"I felt the (column) pad move and heard the beam twist and I yelled for Ed," Nicely said. "We just jumped up and ran. It all came down at one time — in 10 or 15 seconds."

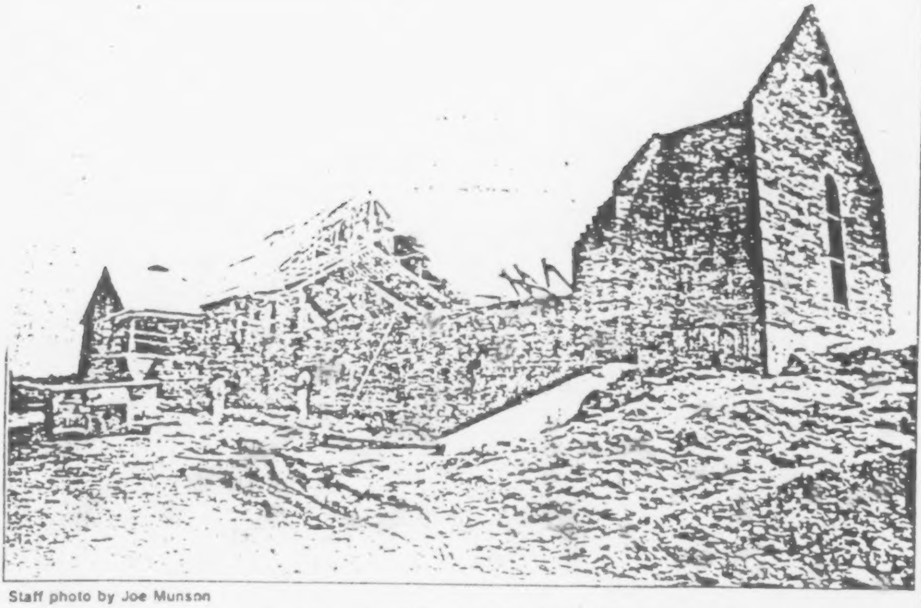
Odle, who was drilling holes in the concrete just inside the north wall of the building, said he saw the steel shift, then heard Nicely yell.

Nicely said the building, which measures about 216 feet by 123 feet, was a heap of metal by the time he and Odle turned around to look from about 20 feet away.

He said he saw that one of the Shobergs was lying on the ground.

Three-fourths of the steel structure had been finished since Evers Equipment Co. began erecting it Aug. 22, Nicely said. The company would have finished its work in about five more weeks.

The Evendale village engineer and building inspector will inspect the scene today to determine the cause of the collapse and estimate the amount of damage, the Evendale Fire Department reported.



Staff photo by Joe Munson

Construction workers jumped off the roof of the new Grants Lick Baptist Church moments before it caved in.

Pastor maintains faith, spirits amid rubble of fallen church

KY. POST JUL 17 1986

By Janelle Lawrence
Kentucky Post Staff Writer

Rev. William Barnard wasn't too sure Tuesday what he was going to preach about this Sunday at the Grants Lick Baptist Church.

His prayers for a topic were answered later that day with a thundering crash — the walls of his new church caved in right after construction workers put on the roof.

He'd rather have been inspired by a quiet rainbow or a silent smile.

"'All things work together for good,' my wife said after all this happened," he said. "That's what I'll preach about because we're so grateful none of the workers were injured and so thankful this didn't happen on dedication day."

El Grande Construction Co. workers were on the roof and heard it crack. They jumped off just before most of the church collapsed like a Popsicle-stick house at 3:59 p.m.

Pat Wolf, who lives a few blocks from the construction site on Clay Ridge Road, was sitting on her front porch reading a newspaper when the roof collapsed.

"I looked up, looked back at the paper, looked up and it all just went down," she said. "I thought for sure they had all been killed."

Mrs. Wolf ran to the road and stopped cars to "I was so terrified I couldn't even think about dialing the phone."

Engineers and a representative of the state fire marshal's office visited the site yesterday to study what went wrong.

The church does not have insurance to cover the collapse. The construction company is assuming the liability, Rev. Barnard said.

Jim Callahan, insurance manager for the El Grande Co., of Wilder, declined comment on the accident until he receives reports on what happened. Reports from the insurance adjuster and engineers will determine when construction resumes, he said.

Rev. Barnard hopes the collapse won't add any costs to the $700,000 bill for the new church.

Cleaning up the rubble of bricks and wood should begin in two to three days. The accident will add about three months to the church's construction time, he said.

Rev. Barnard had hoped to move his flock from the old church — up the road from the new church — into their new sanctuary by October.

In the meantime, Rev. Barnard will continue to give two Sunday morning sermons to accommodate his 500-member congregation. Churchgoers squeeze into the old 125-seat church, founded in 1859, at 8:30 and 11 a.m.

"I don't mind giving my sermon twice. It's always better the second time. But the people miss seeing each other and coming all together for worship."

Senator METZENBAUM. Thank you very much, Mr. Farrington.

Our next witness is Charlie Key, from the Atlanta, Georgia, Building and Construction Trades Council. I am going to ask Senator Matsunaga to preside for a few minutes while I take a phone call outside, in order not to recess the hearing, if you would be good enough to do so.

Please proceed, Mr. Key.

Mr. KEY. Mr. Chairman and members of the Senate, ladies and gentlemen, my name is Charlie Key. I have been Business Manager of the North Georgia Building Trades Council in Atlanta, Georgia. Before that, I was Vice President of Plumbers and Steamfitters Local 72 and a pneumatic control fitter employed by MCC Powers Corporation.

I do appreciate the opportunity to appear before this Committee today in support of S. 492. Atlanta, Georgia is experiencing an unprecedented construction boom, but union construction workers are not sharing in that boom because of the fact of double-breasting. The practice of double-breasting has had a very heavy impact on the construction industry and the construction workers in metro Atlanta.

In 1982, before double-breasting became prevalent, there were over 5,000 union carpenters employed in metropolitan Atlanta. In 1987, there are about 1,400 union carpenters employed in the Atlanta area. In 1982, building trades members were performing about 60 percent of all work in metropolitan Atlanta. By early 1986, that number had fallen to approximately 18 percent, with the amount of work awarded to union general contractors falling to less than 5 percent in 1984. This trend has reversed slightly, but not significantly.

The list of double-breasted contractors I furnished you reads like a "Who's Who in Atlanta Construction." From the largest to the smallest, every union general contractor had to have a non-union shop. Subcontractors were told by double-breasted generals, "If you want to work for us, you need to set up a non-union shop," and the subcontractors obliged. There is not a craft in the building trades that is not affected by double-breasting.

Contractors have been able to double-breast with such impunity under current labor law that union contracts are hardly worth the paper on which they are written. Labor lawyers representing unions advise that under current law and National Labor Relations Board policies it is practically impossible to establish single-employer status.

Of all the instances of double-breasting in Atlanta, I know of only six cases that were resolved satisfactorily for the unions. There were three cases by Electricians Local 613, one case by U.A. Local 72, and one case by Sheetmetal Local 85, and one case by Operating Engineers Local 926 that were resolved by the dissolution of the non-union shop. But in almost every case, the company was careless or the local got a lucky break.

More importantly, however, none of these solutions were pursued to the National Labor Relations Board, and in each instance they were filed in Federal court, claiming breach of contract.

I should mention that during this same period of time there was a number of double-breasting cases that were resolved not to our satisfaction, but were resolved because the union companies diverted all of their work to non-union companies and their union side no longer exists.

Local union business agents have spent hundreds of hours trying to secure evidence to establish single-employer status among the double-breasted companies. They visit job sites, they research corporate records, they interview employees, they follow company vehicles around town. They sometimes even dig through trash bins trying to catch someone's error or to get that lucky break that would provide enough evidence to establish a case that would prevail at the Labor Board.

The companies do not try to hide what they are doing. The list I gave you shows four contractors whose non-union side names are nearly identical to the union entity. Why? Because the union companies cannot afford to give up the good name recognition that union workers have built for them over the years before double-breasting became the standard practice. Looking in the phone book at the names, phone numbers and addresses of some of the double-breasted companies further reveals how brazen they are in this practice.

Two cases in point: Compare union contractor Van Winkle, Inc., phone number, 351-8500, address, 652 Ballemead Avenue, N.W., with their double-breasted contractor, VWC, Inc., phone, 351-9503, address, 652 Bellemead Avenue, N.W.; and union subcontractor Center Brothers, Inc., phone 696-9700, address, 630 Interchange Drive, S.W., with their non-union counterpart, Barnwell, Inc., phone number, 696-9756, address, 630 Interchange Drive, S.W. Barnwell and Center Brothers even share a very distinctive name design that makes the names appear similar from a distance. Some companies go to greater lengths to separate their operations, but they try to keep them close enough to be recognized by their regular customers.

It is not unusual to contact a long-time customer of a union contractor that is now doing business with the union company's non-union counterpart and hear the customer say, "Oh, we're still doing business with the same people we always have." I have personally called customers of the non-union BCB and have been told by the customer that they are doing business with Beers. It took the Construction Market Data and Doge Reports people some time to discover double-breasting. They quite often reported jobs as being contracted by union companies when the jobs were in fact performed by double-breasted companies.

So you see, even the experts did not understand these entities were different. Of course, the double-breasted contractors generally never told the reporting services, the engineers or, most importantly, their customers otherwise. Why? Because the whole scheme was designed to display separateness to only five pairs of eyes, those belonging to the members of the National Labor Relations Board.

Senator **Metzenbaum**. You may conclude your statement.

Mr. **Key**. It is going about a minute more.

But the key here is the shifting of the customers' work. Work that used to be performed by union contractors is now performed by their non-union counterparts. Union Beers Construction Company performed a lot of hospital work. Now the non-union BCB is performing the same work at the same hospitals.

Double-breasting feeds on itself. The non-union sides of union subcontractors are now performing work for the non-union sides of union general contractors. These companies did not just say our experience with your company's work has been so bad, your products are shoddy, that we are going with you again, only this time make it non-union. This is exactly what the AGC and others want you to believe when they say double-breasting came about because of demands in the market, or when they say they are separate union and non-union markets.

I propose to you that double-breasting is not a marketplace response but a response to greed, and this response is made possible because of the high construction unemployment rate in this country. Union construction companies discovered a huge pool of unemployed workers and seized the opportunity to exploit both the employed and the unemployed through the practice of double-breasting. This market demand argument is simply a fiction that contractors and a few Business Roundtable construction users created and currently benefit by. It is a cover for market manipulation and worker exploitation.

I am here to plead that you who represent the little guy out there on the job sites not be fooled by the empty sound and fury you hear about free markets and workers' democratic rights from pin-striped executives that are only concerned with the bottom line.

Senator METZENBAUM. Could you wind up, please?

Mr. KEY. I can stop there. Thank you.

[The prepared statement of Mr. Key, with an attachment, follows:]

STATEMENT OF CHARLIE KEY

Chairman Metzenbaum, members of the Senate, ladies and gentlemen. My name is Charlie Key. I have been business manager of the North Georgia Building Trades Council in Atlanta Georgia, for four years. Before that I was Vice-President of Plumbers and Steamfitters Local 72 and a pneumatic control fitter employed by MCC Powers Corporation.

Atlanta is experiencing an unprecedented construction boom but union construction workers are not sharing in that boom because of double breasting. The practice of double breasting has had a very heavy impact on the construction industry and the construction workers in metro Atlanta.

In 1982, before double breasting became prevalent, there were over 5,000 union carpenters employed in metropolitan Atlanta. In 1987 there is about 1,400 union carpenters employed in Atlanta. In 1982, the building trades members were performing about 60 percent of all work in Metro Atlanta. By early 1986 that number had fallen to approximately 18 percent with the amount of work awarded to union general contractors falling to less that 5 percent in 1984. This trend has reversed slightly but not significantly.

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Contractors have been able to double breast with such impunity under current labor law that union contracts are hardly worth the paper on which they are written. Labor lawyers representing unions advised that under current law and National Labor Relation Board policies, it is practically impossible to establish single employer status.

Of all the instances of doublebreasting in Atlanta, I know of only six cases that were resolved satisfactorily for the unions. There were three cases by Electricians Local 613, One case by U.A. Local 72, one case by Sheetmetal Local 85 and one case by Operating Engineers Local 926 that were resolved by the dissolution of of the non-union shop. But in almost every case, the company was careless or the local got a lucky break.

More importantly, however, none of these solutions were pursued through the National Labor Relations Board. In each instance they were filed in Federal court claiming Breech of Contract.

Local business agents have spent hundreds of hours trying to secure evidence to establish single employer status among the double breasted companies. They visit job sites, they research corporate records, they interview employees, they follow company vehicles around town. They sometimes even dig through trash bins trying to catch some one's error or to get that lucky break that would provide enough evidence to establish a case that would prevail at the labor board. The companies don't try to hide what they are doing. The list shows six contractors whose non-union side names are nearly identical to the union entity. Why? Because the union companies cannot afford to give up the good name recognition that union workers have built for them over the years before double breasting became the standard practice. Looking in the phone book at the names, phone numbers and addresses of some of the double breasted companies further reveals how brazen they are in this practice.

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So you see, even the experts did not understand these entities were different. And, of course, the double-breasted contractors generally never told the reporting services, the engineers or, most importantly, their customers otherwise. Why? Because the whole scheme was designed to display separateness to only five pairs of eyes, those belonging to the members of the National Labor Relations Board.

But the key here is the shifting of the customers' work. Work that used to be performed by union contractors is now being performed by their non-union counterparts. Union Beers Construction Company performed a lost of hospital work. Now non-union BCB is performing the same work at the same hospitals. The Union Fowler Electric Company performed work for Rich's Department Store, and now the non-union Steve Fowler Electric Company is performing most of Rich's electrical work.

Double breasting feeds on itself. The non-union sides of union subcontractors are now performing work for the non-union sides of union general contractors. And this shift did not just happen. These hospitals, for example, did not suddenly jump-up and say, "our experience with your company's work has been so bad and your product is so shoddy that we are going to work with you again, only this time, please make it non-union."

Yet this is exactly what the AGC and others want you to believe when they say that double breasting came about because of the demands in the market, or when they say that there are separate union and non-union markets. I propose to you that double breasting is not a market place response, but a response to greed. And this response is made possible because of the high construction unemployment rate in this country. Union construction companies discovered a huge pool of unemployed workers and seized the opportunity to exploit both the employed and the unemployed through the practice of double breasting. This market demand argument is simply a fiction that contractors and a few Business Roundtable construction users created and currently benefit by. It is a cover for market manipulation and worker exploitation.

I am here to plead that you, who represent the little guy out there on the job sites, not be fooled by the empty sound and fury you hear about free markets and workers' democratic rights from pin-striped executives.

Double breasting and walking away from pre-hire agreements has nothing to do with workplace democracy or market demands. It is simply the old industrial labor relations tactic of whipsawing, transferred to the construction industry and updated to prevent a lawful union response.

The Board tells us we do not have enough evidence and they refuse to help us meet their tough standards by using their subpoena power in the investigative stage of an unfair labor practice charge. And in our vulnerability in places like Atlanta, when we negotiate concessions the contractors just turn around and cut their non-union wages by the same amount. This is not bargaining. This is a conspiracy to fix prices by controlling both sides working in the same market.

The construction market where pre-hire agreements are unenforceable and double breasting flourishes is truly a twilight zone with contractors controlling the horizontal and vertical aspects of the market. We seek a return to the days when a man's handshake was his bond and a Section 8(f) contract insured stability of labor costs for contractors and benefits for workers.

Congress enacted 8(f) for contractors in 1959 and we ask that you clarify for us what you meant back then by passing S.492. Only then will you have ended the outright fraud contractors engage in when they walk away from contracts and the workers these contracts were designed to protect.

ATTACHMENT TO TESTIMONY OF
CHARLIE E. KEY ON S. 492

SUSPECTED DOUBLE BREASTED CONTRACTORS

UNION CONTRACTORS	NONUNION CONTRACTORS
Beers	BCB
Capitol	Zenith
H.C. Beck	Pace
J.A. Jones	Metric
Van Winkle	VWC
Cleveland Consolidated	Cleveland Associates
Herman Russell	Interstate
Holder Construction	ECM
Acousti Engineering Co	Acousti of Macon
McElroy & Hardy	Sound Control
E.L. Thompson	Fleming Drywall
Will-Thack	Perimeter
H.J. Russell	Interstate
Center Brothers	Barnwell
Marietta Interiors	Advance Builders
Marietta Drywall	Houser & Thomas
M.S.I	Ed McElroy & Co.
Superior Rigging	H.T. Horn or H.T. Rigging
Ceco	Formwork Services Atlanta Forming
Paul W. Heard	Westco
Cleveland Consolidated	Cleveland Associates
Fowler Electric	Steve Fowler Electric

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opeiu # 21
AFL-CIO

Senator METZENBAUM. Thank you very much.

Our next witness is Mr. Gast. We are happy to have you with us here this morning, Mr. Gast.

Mr. GAST. Mr. Chairman and members of the Subcommittee, thank you for the opportunity to appear before the Senate Labor Subcommittee to give my views on S. 492. I am strongly opposed to double-breasting and would like to go on record against this unfair practice. Double-breasting is destroying my ability, as an honest union contractor, to bid successfully on projects and has undermined the stability of collective bargaining relationships in our area. Something has to be done to put a stop to it.

Before I address the problem of double-breasting, let me describe my company and its operations. We are a steel erection contractor in the Western New York area. I started as a union ironworker, a trade I learned from my father. In September of 1973, my wife and I formed Contractors Welding of Western New York, Inc. Contractors Welding has a hard-won reputation for excellence.

We are and always have been a union contractor, employing ironworkers and operating engineers. I would like to make two other preliminary points: First, I do not have any quarrel with contractors who run strictly open-shop operations and I do not mind competing with them. My argument is with those contractors who have both union and non-union operations. I believe such setups are totally unfair. Contractors should have to choose whether they are going to be union or non-union. The law should not allow them to have it both ways.

Second, I am not completely familiar with every aspect of S. 492, without knowing all the details it is hard for me to endorse the bill. What I can say emphatically is that double-breasting is an evil practice which must be stopped.

With all of that as background, let me describe the problems double-breasting is causing me and other union contractors. Under the system as it now exists, double-breasted contractors have an absolutely unfair advantage in bidding on work. A concrete example will illustrate my point. The typical double-breasted contractor in our area is a company which has been union for a number of years and then opens a new, non-union company.

Ordinarily, when a new construction company starts up, it cannot immediately bid on many jobs because it is unable to obtain the bonding these jobs require and it is not able to demonstrate the necessary experience and expertise to perform the work properly. However, the non-union component of a double-breasted operation is able to trade on the reputation of its related component in order to get bonding and prove its capability to do the work. Yet, it can submit a lower bid than a union entity because it does not pay union wages and fringe benefits.

It is very difficult for me to compete against an entity that is able to offer the combination of the bonding capability, experience and expertise of an old-line union contractor without the wage rates and fringe benefit costs of a union contractor. In addition, the non-union operation will frequently have little or no overhead and have to build its own reputation and cannot trade on the reputation of a pre-existing union entity.

The next thing I would like to describe is how the practice of double-breasting undermines the stability of collective bargaining. In my experience, bargaining relationships are built on trust. There has to be trust between the contractors and the unions and there also has to be trust between and among the contractors who make up a multi-employer group. Double-breasting destroys this necessary trust. How can unions trust contractors if they know that after an agreement has been reached at the bargaining table, the contractors will bid jobs using their "related entity" and be awarded the jobs because the related entities do not have to pay the union wages and fringes just agreed to and thus can underbid union contractors?

How can I, as a union contractor, agree on proposals to present to the union when my fellow contractors are double-breasted and I am suspicious that they are trying to inflate the union rate in order to make it easier for their non-union entity to get more work? It is obvious that good-faith bargaining cannot take place under such circumstances. Moreover, the mistrust bred by double-breasting is a barrier to the development of creative market recovery programs which are necessary if good union contractors are to compete successfully with open-shop employers.

Finally, double-breasting is destroying workers' standard of living. I want my employees to be able to provide decent lives for their families. My employees, ironworkers and operating engineers alike, are highly skilled and perform difficult and frequently dangerous tasks. They deserve a decent wage and adequate fringe benefits. Double-breasted contractors are ruining any chance for these workers to maintain a decent standard of living.

Before, in our area, non-union contractors who did not pay decent wages and fringe benefits only operated on certain smaller jobs and on the fringes of the construction market. Now, the non-union components of double-breasted companies are being awarded even the biggest jobs. This has depressed wages for all construction workers. Soon, if something is not done, I am afraid the majority of construction workers will not be paid a living wage.

I appreciate the opportunity you have given me to express my views on double-breasting. I hope that Congress will take action to amend the Taft-Hartley Act to prevent contractors with union contracts from setting up a non-union firm to perform the same kind of work in the same geographic area. Without an end to double-breasting, the very survival of contractors such as myself is in very serious jeopardy. Your decision on this issue will have a tremendous impact on my future and I hope you will act responsibly and favorably.

Thank you.

[The prepared statement of Mr. Gast follows:]

STATEMENT OF JOHN GAST, JR.
CONTRACTORS WELDING OF WESTERN NEW YORK, INC.
BEFORE THE SUBCOMMITTEE ON LABOR OF THE COMMITTEE ON
LABOR AND HUMAN RESOURCES, U.S. SENATE

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE:

THANK YOU FOR THE OPPORTUNITY TO APPEAR BEFORE THE SENATE LABOR SUBCOMMITTEE TO GIVE MY VIEWS ON S. 492. I AM STRONGLY OPPOSED TO DOUBLE-BREASTING AND WOULD LIKE TO GO ON THE RECORD AGAINST THIS UNFAIR PRACTICE. DOUBLE-BREASTING IS DESTROYING MY ABILITY, AS AN HONEST UNION CONTRACTOR, TO BID SUCCESSFULLY ON PROJECTS AND HAS UNDERMINED THE STABILITY OF COLLECTIVE BARGAINING RELATIONSHIPS IN OUR AREA. SOMETHING HAS TO BE DONE TO PUT A STOP TO IT.

BEFORE I ADDRESS THE PROBLEMS OF DOUBLE-BREASTING, LET ME DESCRIBE MY COMPANY AND ITS OPERATIONS. WE ARE A STEEL ERECTION CONTRACTOR IN THE WESTERN NEW YORK AREA. I STARTED AS A UNION IRONWORKER, A TRADE I LEARNED FROM MY FATHER. IN SEPTEMBER OF 1973, MY WIFE AND I FOUNDED CONTRACTORS WELDING

OF WESTERN NEW YORK INC. OVER THE YEARS, WE HAVE BUILT THE BUSINESS UP TO THE POINT WHERE WE ARE NOW GROSSING $2 MILLION. CONTRACTORS WELDING HAS A HARD-WON REPUTATION FOR EXCELLENCE. WE SPECIALIZE IN PARTICULARLY DIFFICULT JOBS. WE DON'T DO EASY JOBS; WE ENJOY THE CHALLENGE OF THE HARD ONES.

WE ARE AND ALWAYS HAVE BEEN A UNION CONTRACTOR, EMPLOYING IRONWORKERS AND OPERATING ENGINEERS. ALTHOUGH I HAVE HAD MY DIFFERENCES WITH REPRESENTATIVES OF THESE UNIONS OVER THE YEARS, WE HAVE A GOOD RELATIONSHIP BASED ON MUTUAL TRUST AND RESPECT.

I WOULD LIKE TO MAKE TWO OTHER PRELIMINARY POINTS. FIRST, I DON'T HAVE ANY QUARREL WITH CONTRACTORS WHO RUN STRICTLY OPEN-SHOP OPERATIONS AND I DON'T MIND COMPETING WITH THEM. I PERSONALLY KNOW SEVERAL SUCH CONTRACTORS AND THEY ARE REPUTABLE BUSINESSMEN. THEIR APPROACH TO DOING BUSINESS IS SIMPLY DIFFERENT FROM MINE. MY ARGUMENT IS WITH THOSE CONTRACTORS WHO HAVE BOTH UNION AND NON-UNION OPERATIONS. I BELIEVE SUCH SET-UPS ARE TOTALLY UNFAIR. CONTRACTORS SHOULD HAVE TO CHOOSE WHETHER THEY'RE GOING TO BE UNION OR NON-UNION. THE LAW SHOULDN'T ALLOW THEM TO HAVE IT BOTH WAYS. SECOND, I AM NOT COMPLETELY FAMILIAR WITH EVERY ASPECT

OF S. 492. WITHOUT KNOWING ALL THE DETAILS IT IS HARD FOR ME TO ENDORSE THE BILL. WHAT I CAN SAY EMPHATICALLY IS THAT DOUBLE-BREASTING IS AN EVIL PRACTICE WHICH MUST BE STOPPED.

WITH ALL THAT AS BACKGROUND, LET ME DESCRIBE THE PROBLEMS DOUBLE-BREASTING IS CAUSING ME AND OTHER UNION CONTRACTORS. UNDER THE SYSTEM AS IT NOW EXISTS, DOUBLE-BREASTED CONTRACTORS HAVE AN ABSOLUTELY UNFAIR ADVANTAGE IN BIDDING ON WORK. A CONCRETE EXAMPLE WILL ILLUSTRATE MY POINT. THE TYPICAL DOUBLE-BREASTED CONTRACTOR IN OUR AREA IS A COMPANY WHICH HAS BEEN UNION FOR A NUMBER OF YEARS AND THEN OPENS A NEW, NON-UNION, COMPANY. ORDINARILY, WHEN A NEW CONSTRUCTION COMPANY STARTS UP, IT CAN NOT IMMEDIATELY BID ON MANY JOBS

BECAUSE IT IS UNABLE TO OBTAIN THE BONDING THESE JOBS REQUIRE AND IT IS NOT ABLE TO DEMONSTRATE THE NECESSARY EXPERIENCE AND EXPERTISE TO PERFORM THE WORK PROPERLY. HOWEVER, THE NON-UNION COMPONENT OF A DOUBLE-BREASTED OPERATION IS ABLE TO TRADE ON THE REPUTATION OF ITS RELATED COMPONENT IN ORDER TO GET BONDING AND PROVE ITS CAPABILITY TO DO THE WORK. YET, IT CAN SUBMIT A LOWER BID THAN A UNION ENTITY BECAUSE IT DOES NOT PAY UNION WAGES AND FRINGE BENEFITS. IT IS VERY DIFFICULT FOR ME TO COMPETE AGAINST AN ENTITY THAT IS ABLE TO OFFER THE COMBINATION OF THE BONDING CAPABILITY, EXPERIENCE AND EXPERTISE OF AN OLD-LINE UNION CONTRACTOR WITHOUT THE WAGE RATES AND FRINGE BENEFIT COSTS OF A UNION CONTRACTOR. IN ADDITION, THE NON-UNION OPERATION WILL FREQUENTLY HAVE LITTLE

OR NO OVERHEAD SINCE IT WILL BE USING ALL OR PART OF THE UNION COMPANY'S OFFICE, EQUIPMENT, ACCOUNTANTS, ETC. THE COMBINATION OF LOWER WAGES AND LOWER OVERHEAD DESTROY MY ABILITY TO COMPETE. I DO NOT HAVE THE SAME PROBLEM COMPETING AGAINST STRICTLY NON-UNION COMPANIES BECAUSE SUCH COMPANIES HAVE TO PAY A FULL OVERHEAD AND HAVE TO BUILD THEIR OWN REPUTATION AND CANNOT TRADE ON THE REPUTATION OF A PRE-EXISTING UNION ENTITY.

THE NEXT THING I'D LIKE TO DESCRIBE IS HOW THE PRACTICE OF DOUBLE-BREASTING UNDERMINES THE STABILITY OF COLLECTIVE BARGAINING. IN MY EXPERIENCE, BARGAINING RELATIONSHIPS ARE BUILT ON TRUST. EACH SIDE MUST BE ABLE TO RELY ON THE OTHER SIDE'S WORD. THERE HAS TO BE TRUST BETWEEN THE CONTRACTORS AND THE UNIONS AND THERE ALSO HAS TO BE TRUST BETWEEN AND AMONG THE CONTRACTORS WHO MAKE UP A MULTI-EMPLOYER GROUP. DOUBLE-BREASTING DESTROYS THIS NECESSARY TRUST. HOW CAN UNIONS TRUST CONTRACTORS IF THEY KNOW THAT, AFTER AN AGREEMENT HAS BEEN REACHED AT THE BARGAINING TABLE, THE CONTRACTORS WILL

BID JOBS USING THEIR "RELATED ENTITY" AND BE AWARDED THE JOBS BECAUSE THE RELATED ENTITIES DON'T HAVE TO PAY THE UNION WAGES AND FRINGES JUST AGREED TO AND THUS CAN UNDERBID UNION CONTRACTORS? HOW CAN I, AS A UNION CONTRACTOR, AGREE ON PROPOSALS TO PRESENT TO THE UNION WHEN MY FELLOW CONTRACTORS ARE DOUBLE-BREASTED AND I AM SUSPICIOUS THAT THEY ARE TRYING TO INFLATE THE UNION RATE IN ORDER TO MAKE IT EASIER FOR THEIR NON-UNION ENTITY TO GET MORE WORK? IT IS OBVIOUS THAT GOOD-FAITH BARGAINING CAN NOT TAKE PLACE UNDER SUCH CIRCUMSTANCES. MOREOVER, THE MISTRUST BRED BY DOUBLE-BREASTING IS A BARRIER TO THE DEVELOPMENT OF CREATIVE

MARKET RECOVERY PROGRAMS WHICH ARE NECESSARY IF GOOD UNION CONTRACTORS ARE TO COMPETE SUCCESSFULLY WITH OPEN SHOP EMPLOYERS.

FINALLY, DOUBLE-BREASTING IS DESTROYING WORKERS' STANDARD OF LIVING. AS I MENTIONED EARLIER, I STARTED AS A UNION IRONWORKER. COLLECTIVE BARGAINING HELPED TO PROVIDE ME WITH A STANDARD OF LIVING SUFFICIENT TO RAISE AND SUPPORT A FAMILY WITH DIGNITY. I WANT MY EMPLOYEES TO BE ABLE TO PROVIDE SIMILARLY DECENT LIVES FOR THEIR FAMILIES. MY EMPLOYEES, IRONWORKERS AND OPERATING ENGINEERS ALIKE, ARE HIGHLY SKILLED AND PERFORM DIFFICULT AND FREQUENTLY DANGEROUS TASKS. THEY DESERVE A DECENT WAGE AND ADEQUATE FRINGE BENEFITS.

DOUBLE-BREASTED CONTRACTORS ARE RUINING ANY CHANCE FOR THESE WORKERS TO MAINTAIN A DECENT STANDARD OF LIVING. BEFORE, IN OUR AREA, NON-UNION CONTRACTORS WHO DIDN'T PAY DECENT WAGES AND FRINGE BENEFITS ONLY OPERATED ON CERTAIN SMALLER JOBS AND ON THE FRINGES OF THE CONSTRUCTION MARKET. NOW, THE NON-UNION COMPONENTS OF DOUBLE-BREASTED COMPANIES ARE BEING AWARDED EVEN THE BIGGEST JOBS. THIS HAS DEPRESSED WAGES FOR ALL CONSTRUCTION WORKERS. SOON, IF SOMETHING IS NOT DONE, I AM AFRAID THE MAJORITY OF CONSTRUCTION WORKERS WILL NOT BE PAID A LIVING WAGE.

I APPRECIATE THE OPPORTUNITY YOU HAVE GIVEN ME TO EXPRESS MY VIEWS ON DOUBLE-BREASTING. I HOPE THAT CONGRESS WILL TAKE ACTION TO AMEND THE TAFT-HARTLEY ACT TO PREVENT CONTRACTORS WITH UNION CONTRACTS FROM SETTING UP A NON-UNION FIRM TO PERFORM THE SAME KIND OF WORK IN THE SAME GEOGRAPHIC AREA. SUCH A CHANGE WILL ALLOW UNION CONTRACTORS TO COMPETE ON A FAIR BASIS.

Senator **Metzenbaum**. I gather the thrust of your remarks, Mr. Gast, is that you are a union contractor and you do not care if there are non-union contractors operating in the area, but it is an impossible situation for you to compete with union contractors who create double-breasted units?

Mr. **Gast**. That is correct, sir.

Senator **Metzenbaum**. Mr. Farrington, what about the argument that union contractors have to create a non-union subsidiary in order for them to remain competitive in a particular area?

Mr. **Farrington**. Senator Metzenbaum, I think Mr. Gast answered that rather well in the respect that he feels—and I have had many fair contractors in the State of Ohio say to me not once but many, many times that they, too, can be competitive on an equal basis, union versus non-union.

A lot of our subcontractors have even gotten out of the bid habit when they see in fact a double-breasted operation appear on the bid list, the union contractor and the alter ego of the non-union contractor, knowing full well that they do not have a fair edge there. It costs the contractor money to bid each and every project, win, lose or draw. It costs him money, so therefore they withdraw from the bid.

I think the argument that it increases competitiveness is merely a smokescreen. Mr. Gast referred to market recovery programs in New York State. We have similar programs in Ohio. Many of the local unions have the option of being competitive on various projects with labor-management consulting, and we have addressed the competitive issue as well as the productivity issue.

We hear competitiveness from foreign contractors. I am happy to say that in the next couple of days we hopefully will conclude a successful project agreement with the Honda folks regarding a $450 million project in Ohio. This will be a 100 percent union project which will be competitively bid. We can be competitive on a one-to-one basis, but not with the hook of a double-breasted alter ego in there.

Senator **Metzenbaum**. I want to thank you, Mr. Gast, Mr. Farrington, and Mr. Key. Thank you very much for your testimony. It is most helpful to this Committee.

Our next and final panel is Richard Heckert, Chairman and Chief Executive Officer of du Pont de Nemours, of Wilmington, Delaware; W. A. Pogue, Chairman and President, CBI Industries, of Oak Brook, Illinois; and Howard Jenkins, Special Counsel, National Association of Minority Contractors, Washington, D.C.

Mr. Heckert, we will be happy to hear from you first.

STATEMENTS OF RICHARD E. HECKERT, CHAIRMAN AND CHIEF EXECUTIVE OFFICER, E.I. DUPONT DE NEMOURS & CO., INC., ON BEHALF OF BUSINESS ROUNDTABLE; WILLIAM A. POGUE, CHAIRMAN AND CHIEF EXECUTIVE OFFICER, CBI INDUSTRIES, INC., AND HOWARD JENKINS, SPECIAL COUNSEL, NATIONAL ASSOCIATION OF MINORITY CONTRACTORS; ACCOMPANIED BY RALPH C. THOMAS, EXECUTIVE DIRECTOR

Mr. **Heckert**. Thank you, Mr. Chairman.

Mr. Chairman and members of the Subcommittee, my name is Richard E. Heckert and I am Chairman and Chief Executive Officer of the duPont Company. In my oral testimony, I am representing duPont, the Business Roundtable, the U.S. Chamber of Commerce, and the National Association of Manufacturers.

I have submitted additional written testimony on behalf of duPont and the BRT. The Chamber and NAM will submit written statements separately.

I am accompanied by Charles Brown, Vice President in charge of engineering at duPont, and Leo Hannon, Managing Counsel, Labor Law, for duPont.

duPont is a large industrial company with about $28 billion in worldwide sales. Our major businesses are chemicals and specialty products, petroleum and coal, and we operate in the U.S. and in more than 50 countries overseas.

My purpose this morning is not to address the relative strengths of union and open shops, but to emphasize the importance of cost-effectiveness in the construction industry. In examining——

Senator METZENBAUM. I did not get that word.

Mr. HECKERT. Cost-effectiveness in the construction industry.

Senator METZENBAUM. Thank you.

Mr. HECKERT. We are here ostensibly to discuss a specific proposal, S. 492. In fact, however, we must consider a larger issue of concern to every American, jobs and the worldwide competitiveness of U.S. industry. The word "competitiveness" is often heard in Washington these days. In my judgment, your decision on S. 492 is an important test of whether concern about our industrial competitiveness will yield useful results or be remembered as a flash in the pan.

Let me begin with some history. In much of the post-World War II era, union contractors had a virtual monopoly on U.S. construction projects. Because domestic companies were not seriously challenged by overseas competitors, especially in our own markets, construction costs were not a major restraint as we expanded capacity. These costs rose slightly faster than the Consumer Price Index, but since all domestic companies were in the same boat, no one suffered a competitive disadvantage.

In the 1970s, we saw periods of rapid inflation, however, and construction costs, led by the labor component, increased at rates significantly faster than the CPI. Foreign manufacturers with competitive technology and lower capital and operating costs began to capture a major share of both U.S. and international markets.

Here at home, construction costs accelerated rapidly at the very time we found ourselves battling overseas firms which had competitive advantages ranging from government subsidies to substantially lower wage rates.

The situation could not continue long without the loss of domestic business and jobs in capital-intensive industries. In the 1970s, free market economics finally worked and some sorely needed alternatives began to develop. In addition to the few open-shop contractors who were scaled to do major work, many large union contractors acquired new open-shop capabilities. It became possible to award construction contracts on the basis of competitive costs.

du Pont's experiences were shared by industry in general. With an annual U.S. capital budget of over $2 billion, we do construction work at plant sites throughout the country. Today, about half of our work is with union shops, the balance with open shops. The mix of the two is often critically important in developing competitive bids. The discipline imposed by the bidding process, in turn, has helped many union shops become more competitive.

In Delaware, for example, we used only union shops for major capital projects for many years, spending hundreds of millions of dollars. We became painfully aware that our costs were simply too high. When we asked the unions to work with us and improve productivity, they essentially ignored our request. We could have stopped building in Delaware, but instead we invited competitive bids from open-shop firms in the surrounding area.

Construction costs came down as open shops submitted bids at a lower unit cost, and union shops reduced their bids to stay competitive. Today, we use both union and open shops, and the end result is more building and more jobs in Delaware.

Now, S. 492 proposes to break what the free market fixed. It would eliminate so-called "double-breasting" by restricting a contractor's freedom to compete in both union and open-shop markets. As a practical result, most double-breasted companies would have to close down either their union or their non-union organization. In some cases, union members would lose out; in others, non-union construction employees would suffer. But in all cases, the companies seeking to build facilities would lose. Why? Because the pool of contractors available to bid on construction jobs would be smaller, and competitive bidding would inevitably become less intense.

Further complicating the issue is the ambiguous definition of the term "single employer" in both the House and Senate versions.

Senator **Metzenbaum**. Could you try to wind up, please, Mr. Heckert?

Mr. **Heckert**. Would you like to have me conclude?

Senator **Metzenbaum**. If you would wind up, please.

Mr. **Heckert**. You will miss a fair amount, but I will move to the end and you can get the rest in the paper, if you prefer.

Senator **Metzenbaum**. Well, if you could summarize the balance of your comments in a minute, I would be happy to have you do so.

Mr. **Heckert**. All right. Single employer, which we have discussed. I deal with the ambiguity in existing and future legislation, and I would point out that since it is so difficult for us to decide what existing law covers, I wonder about the assurances we are getting on the new law.

I certainly would want merit shop arrangements to continue, and that is very important to all of those who buy construction services.

Finally, I make the observation that record trade deficits and sluggish economic growth reveal serious problems that will not go away on their own. Strong action is needed to strengthen our basic industries, to insure growth and our standard of living.

Second, there is no simple or single solution. The government must address the budget deficits, achieve workable currency relationships, and help restore balance to trade flows. Private industry must achieve and maintain state-of-the-art technology and go beyond, where possible, focus on customers and markets, reduce costs and improve productivity. Cost-effectiveness construction is essential to these efforts.

The outcome of this debate and others now under way in Congress will affect the cost-competitiveness of U.S. industry, make no mistake. Your decisions on these issues will tell us and our competitors overseas just how serious we are about restoring America's industrial health. I strongly urge you to keep this point in mind during your deliberations.

Thank you. At the right time, I will take your questions.

[The prepared statement of Mr. Heckert follows:]

Written Statement on S. 492

by

R. E. Heckert

Chairman

E. I. du Pont de Nemours and Company

On behalf of

The Business Roundtable

Labor Subcommittee

of the

Senate Committee on Labor and Human Resources

Washington, D.C.

June 4, 1987

Mr. Chairman, members of the Subcommittee, my name is Richard E. Heckert and I am chairman and chief executive officer of the Du Pont Company. In this written statement, I am representing Du Pont and The Business Roundtable.

Du Pont is a large industrial company with worldwide sales of about $28 billion. Our major businesses are chemicals and specialty products, petroleum and coal, and we operate in the U.S. and more than 50 countries overseas. Our products are sold in most major markets and bring important benefits to consumers worldwide.

My purpose in testifying today is not to address the relative strengths of union and open shops, but to emphasize the importance of cost-effectiveness in the construction industry. In examining the potential impact of S. 492, I will offer both general comments and a legal analysis of the proposal.

These hearings were called ostensibly to discuss a specific proposal -- S. 492. In fact, however, we must address a larger issue of concern to every American -- jobs and the worldwide competitiveness of U.S. industry. "Competitiveness" is a term much in vogue in Washington these days. In my judgment, your decision on S. 492 is an early test of whether concern about U.S. industrial competitiveness will yield useful results or be remembered as a flash in the pan. I welcome the opportunity to explore this point in greater detail.

Let me begin with some history. In much of the post-World War II era, union contractors had a virtual monopoly on U.S. construction projects. Because U.S. companies were not seriously challenged by overseas competitors, especially in our lucrative domestic markets, the cost of construction was not a major restraint as we expanded capacity. Construction costs tended to rise slightly faster than the Consumer Price Index, but since all domestic companies were more or less in the same boat, none experienced a competitive disadvantage.

In the 1970s, however, two new factors emerged. First, the U.S. began to experience periods of rapid inflation, and construction costs -- led by the labor component -- increased at rates significantly higher than the CPI. Second, foreign companies with competitive technology and lower capital and operating costs began to capture a major share of both U.S. and international markets. U.S. construction costs were accelerating rapidly at the very time we found ourselves battling overseas firms who had competitive advantages ranging from government subsidies to substantially lower wage rates.

The situation could not continue long without the loss of domestic business and jobs in capital-intensive industries. In the 1970s free market economics worked, and some sorely needed alternatives began to develop. In addition to the few open shop contractors scaled to do major work, many large union contractors acquired open shop capabilities. It became possible to award construction contracts on the basis of competitive costs. We revalidated the lessons of Economics 101 -- monopolies tend to force prices up; competition among vendors tends to restrain costs.

Let me share some of Du Pont's experience, recognizing that it was typical for industry in general. Our annual U.S. capital budget exceeds $2 billion and we do construction work at plant sites throughout the country. About half of our U.S. work is done by union shop firms; the balance by open shops. We find that the mix of the two is often critically important in developing competitive bids. The discipline imposed by the bidding process, in turn, has helped many union shops become more competitive.

In Delaware, for example, we used only union shops for major capital projects for many years, spending hundreds of millions of dollars. We became painfully aware that our costs were too high. When we asked the unions to work with us and their contractors to improve productivity, they essentially ignored our request for cooperation. We could have stopped building in Delaware, but instead we invited competitive bids from open shop firms in the surrounding area.

As a result, our construction costs came down. Open shops submitted bids at a lower unit cost, and union shops reduced their bids to stay competitive. Today we use both union and open shop contractors, and the end result is more building and more jobs in Delaware.

Now S. 492 proposes to break what the free market fixed. It would eliminate so-called "double-breasting" by restricting a contractor's freedom to compete in both union and open shop markets. As a practical result, most double-breasted companies would have to close down either their union or non-union organization. In some cases union members would lose out; in others non-union construction employees would suffer. But in all cases, the companies seeking to build facilities would lose. Why? Because the pool of contractors available to bid on construction jobs would be smaller, and competitive bidding would inevitably become less intense.

Further complicating the issue is the ambiguous definition of the term "single employer" in both the House and Senate versions of the bill. We are very concerned that companies buying construction services might be interpreted by the courts to be the "single employer." We are also concerned that the controls that traditionally exist between contractors and subcontractors on job sites will be used to make single employer findings. We recognize that the bill's proponents claim the language should not be interpreted this way. However, probably only a court can make that judgment, and protracted litigation is likely. This would have a chilling effect on users of construction services and contractors alike. It would discourage any merit shop arrangements in which union and non-union firms work side by side on construction sites. Once again, it would reduce competitive bidding.

When competition declines under S. 492, costs of construction will escalate, forcing up product costs and the selling prices of U.S.-made goods and services. As selling prices rise, U.S. businesses will lose markets and Americans will lose jobs. In short, we would turn back the clock to the period when American industry got off the track.

There are other effects as well. U.S. corporations -- Du Pont among them -- make decisions about construction projects every day. The decisions are based on a variety of inputs, but basically it all comes down to whether competitive product prices, less cost of goods produced, will provide an acceptable return on capital employed. In a highly competitive global marketplace, especially in capital-intensive businesses, the cost of construction is a key element in that equation. Even now many capital projects -- new plants and retooling of existing plants -- are rejected or postponed due in part to high costs of construction. S. 492 would make these conditions even worse.

With less total construction, the construction industry would find itself carving up a smaller and smaller pie. S. 492 will not give a single new job to a union or non-union construction employee. In the end market forces determine whether or not construction takes place, and if costs rise -- and they will under S. 492 -- in the long run no one benefits.

The alternatives are clear. We can keep the law as it is and maintain competitiveness in the construction industry. Or we can legislate away competition in construction without acknowledging the global competitiveness implications of such actions.

No comprehensive program has yet been enacted to bolster U.S. competitiveness, but two facts have become apparent:

First, we cannot duck the issue. As record trade deficits and sluggish domestic economic growth indicate, we have serious problems that will not go away on their own. Action is required to strengthen our basic industries and ensure growth in our standard of living.

Second, there is no simple or single solution. Both government and the private sector must take steps to improve U.S. industrial competitiveness. Government must develop an aggressive program to address the budget deficit, achieve workable currency relationships and help restore balance to trade flows. And private industry must achieve and maintain state-of-the-art technology -- and beyond, where possible -- focus on customers and markets, reduce costs and improve productivity. Cost-effective construction is essential to these efforts.

The outcome of this debate and others now under way in Congress will affect the cost-competitiveness of U.S. industry. Your decisions on these issues will tell us -- and our competitors -- just how serious we are about restoring America's industrial health. I strongly urge you to keep this point in mind during your deliberations.

Legal Analysis

Our concern that S. 492 may have a serious negative impact on the ability of American industries to compete is centered in the single-employer part of the bill, including the penalties inflicted for being found a single employer.

If the purpose of this bill is to prevent companies from avoiding their bargaining obligations by setting up sham operations, it is redundant. In June 1986, the Fifth Circuit Court of Appeals in New Orleans enforced an NLRB finding of single employer and obligated a union electrical contractor to extend its labor agreement to cover its open shop operation. NLRB v DMR Corporation, 795 F.2d 472. See also Neighborhood Roofing, 276 NLRB 81, a 1985 case in which the Board made a single-employer finding and included employees in the same unit. The NLRB and the Court made their decisions based on the law as it presently exists.

If the purpose of the bill is to reach out and gain something for the building trades unions they never had before, it has an excellent chance of achieving that goal. Granted that the construction industry has received limited special treatment in past labor legislation, it has been done only to preserve existing methods of doing business which were mutually beneficial to management and labor. This bill goes well beyond preservation of workable practices.

In the 1959 Amendments to the National Labor Relations Act, herein called the Act, Congress had its attention drawn to two elements unique to the construction industry: (1) contractors and subcontractors had a close working relationship and (2) many contractors needed to make pre-bid estimates on labor costs and, after receiving the bids, have access to hiring halls. The former interest was addressed in the so-called hot cargo provision, Section 8(e): and the latter interest in the pre-hire provision, Section 8(f). As a consequence, contractors and unions were allowed to enter into contracts which would be otherwise illegal. These provisions preserved established, mutually acceptable, methods of doing business.

Unlike prior special exceptions, S. 492 is not a carve-out-from-broader legislation to preserve longstanding mutually acceptable methods of business. The proposed amendment to Section 2(a) of the Act furthers the interest of only one element in the construction industry, the building trades unions. It does not address the needs of the industry but acts to curb a development that is in the best interest of the country as a whole -- a competitive construction industry -- by legislatively extending the building trades power base.

It is difficult to say what businesses or parts of businesses will be covered by this bill. The proposed amendment to Section 2(a) of the Act refers to businesses "In the construction industry." These words, "construction industry," were used in the two 1959 Amendments already mentioned, Sections 8(e) and 8(f). However, despite the similarity in language, the meaning differs.

In an 8(e) case, Church's Fried Chicken, 183 NLRB 1032, the NLRB found that a retail business was "an employer in the construction industry" because one of its employees superintended the construction of new stores and engaged contractors to perform the actual construction work. The Board reasoned that, since the construction industry was excepted from certain aspects of 8(e) because of the accepted degree of control contractors exercised over subcontractors, and since Church's was acting like a general contractor, it would make sense to include it within the phrase, "an employer in the construction industry." This was despite the fact that Church's primary business was selling fried chicken to retail customers.

Section 8(f), the pre-hire Section in the existing law, applies to employers "engaged primarily in the building and construction industry." The purpose of this Section was to give contractors a base for making pre-bid estimates on labor costs and then provide a source of employee through hiring halls. In interpreting the application of this Section, the Board has been more restrictive than it was in 8(e) cases, but it has also included employers engaged in other businesses. In Ziddel Explorations, Inc., 175 NLRB 887, the Board concluded that Ziddel, a shipbuilder, was covered by Section 8(f) because it was also involved in the dismantling operation at a missile site. The Board reasoned that Ziddel could have used labor cost data in making a bid on the dismantling job and could have used a hiring hall to get skilled craftsmen.

What kinds of employers is this legislation targeting and what is the rationale for targeting them? A reasonable analysis indicates that it probably will include industrial, retail and commercial businesses that are now unaware of the potential impact of extended labor contracts. This is true even under the amendments to H.R. 281 which now uses the 8(f) language "engaged primarily in the building and construction industry."

Once a targeted business is included within the purview of the proposed amendment, the employer will find new rules for determining whether or not it is a single employer. The present rules give varying weight to three or four factors, but ultimately decisions are made on a totality of circumstances. Again, the intent is to prevent the employer from avoiding its legal responsibilities to its organized employees by establishing a sham company. Local 627 I.U.O.E. v NLRB, 518 F.2d 1040, Victor Block, Inc., 176 NLRB 70, Ben's Construction Co., 167 NLRB 1118, Acoustics, Inc., 270 NLRB 1046, Samuel Kosoff & Sons, 269 NLRB 424.

S. 492 takes the individual elements that are presently used collectively for decision-making and treats each in isolation. It makes it easier to make single-employer findings but it has nothing to do with the alleged harm. How does the common ownership of two businesses prove that one business is being used to deprive the other of work? This test might get a sham operator but it will undoubtedly get a lot of legitimate businesses as well.

Using "control," as a single element for making decisions, evidences a lack of understanding of how construction jobs function. Control is and always has been a major factor in the relationship between contractors and subcontractors in the construction industry. It exists because of the critical need to coordinate various aspects of a job in order to create a quality finished product. It has nothing to do with avoiding collective bargaining obligations. Amended H.R. 281 does not solve this problem because it only excludes evidence of the existence of a contractor/subcontractor relationship from making a single-employer finding. The various elements that make up "control" could still be used to saddle a contractor or subcontractor with a union contract even though it was only trying to complete a quality job.

Under present law, once a single-employer relationship is found, it is necessary for the Board to determine that the two groups of employees involved form an appropriate unit before the Board will extend the labor agreement to the unorganized employees. Section 9(b) of the Act directs the Board to decide in each case the unit appropriate for collective bargaining.

The difficulties in determining the appropriateness of bargaining units in the construction industry have been recognized for many years. The tests used are based upon shared or common interests. Obviously these are not the same tests used to establish single employer and the Board, and courts have taken strong positions that separate findings have to be made. South Prairie Construction Co. v Engineers, 425 U.S. 800 and cases cited therein.

One of the primary objectives of the Act is to promote and protect employee free choice. Accordingly, the Board and the courts have been very reluctant to force a contract on unorganized employees and will do so only in very limited circumstances. Groups of employees are only accreted to existing bargaining units when they have such a close community of interest with the existing unit that they have no true identity distinct from it. NLRB v DMR Corporation, 795 F.2d 472, 5 CA 1986.

The proposed remedy of automatically extending a collective bargaining contract to unorganized employees not only does violence to Section 9(b), the long case law history, and the rights of the unorganized, but also to common sense. If an unorganized business entity and a commonly owned organized pipe fitting business operating within the restrictions of a pipe fitters union agreement are found to be single employers, what happens to the unorganized people who are laborers, helpers, and skilled workers outside the pipe fitter craft? What happens to the way the previously unorganized business carries out its day-to-day functions? Can it continue to do things such as work employees across craft lines? It is probable that the changed nature of its operations will eliminate it as a competitive entity.

The proposed amendment to 8(f), the pre-hire agreement, makes sense if it is understood that once these reluctant business entities and their employees are locked into an agreement, there must be some way of keeping them there. The proposed language would maintain a status quo situation until after the expiration of a labor contract. There would be no other way out. At that time, if an election is conducted, it would be in an "appropriate bargaining unit." Obviously, this would be in an association-wide unit or one created by the forced merger of the organized and unorganized businesses. In short, while the Board will be prevented from playing a role in the establishment of the unit, it will be asked to bless one that this legislation created.

Even if the proposed amendment to 8(f) is looked at in isolation, the concern of the proponents over contractors voluntarily withdrawing from pre-hire agreements has been satisfied by the NLRB in the Deklewa case, 282 NLRB 184, February 25, 1987. Contractors can no longer unilaterally repudiate pre-hire agreements before the agreements expire or until the employees covered by the contracts vote to reject their representative.

The National Labor Relations Act is a delicately woven fabric of rights and obligations. The various sections do not stand in isolation, but are balanced by and interpreted by other sections. It is very seldom that one part can be changed without an impact on other parts. Interrelationships with

Sections 8(e), 8(f), and 9(b) have already been touched upon in these very limited comments. Other sections of considerable importance such as 8(b)(4)(B), the Secondary Boycott Section, deal with such sophisticated subjects as separate persons, allies, and struck work. What impact will this legislation have on this carefully developed body of law? What happens to an industrial employer if a small part of its business is in the construction industry? Will the bulk of the business lose the protection of 8(b)(4)(B)? Will cases such as Denver Building, 341 U.S. 675, and American Federation of Television & Radio Artists v NLRB, 462 F.2d 887, still be good law?

Changes to the Act should take place only if a real need exists and only after all the ramifications have been fully considered. The need here is seriously suspect and the negative ramifications are considerable. This single-employer legislation can encompass many businesses that are not considered to be the culprits. It makes it easier to find the guilty but it also enmeshes innocents and it extends a severe remedy to guilty and innocent alike. Its potential impact is so much greater than its stated intent that it casts serious suspicion on its real objectives. There is strong reason to believe that this legislation will be used as a sword and not as a shield. It is important to keep in mind that the shield already exists.

New legislation generates new litigation and extended periods of uncertainty. This is particularly true in these very litigious times. At a point in our economic history when legal stability is desperately needed so we can plan our future, the last thing needed is new legislation to solve a problem that is adequately addressed by existing law.

6/4/87

Senator **Metzenbaum**. Thank you very much. Your entire statement will be included in the record.

Mr. **Heckert**. Thank you.

Senator **Metzenbaum**. Mr. Pogue, we are very happy to welcome you, and I want to say that Congressman Harris Fawell had indicated that he would prefer to be present with us in order to introduce you. But as he cannot be here, his statement will be included in the record at this point.

[Representative Harris N. Fawell's introductory statement follows:]

INTRODUCTORY STATEMENT OF CONGRESSMAN FAWELL OF ILLINOIS

S. 492, CONSTRUCTION INDUSTRY LABOR LAW AMENDMENTS

SUBCOMMITTEE ON LABOR

COMMITTEE ON LABOR AND HUMAN RESOURCES

Mr. Chairman, I appreciate your giving me the opportunity to introduce the next witness, Bill Pogue. More importantly, I appreciate your giving Bill Pogue the opportunity to testify before this distinguished subcommittee on S. 492.

Bill Pogue is the chairman, president, and chief executive officer of CBI Industries in Oak Brook, Illinois, which is located in my Congressional district. Bill Pogue's career with CBI began, however, in a plant in Birmingham, Alabama in 1954. Through 1980, he worked in CBI's sales and management operations. In 1982 he became the chairman, president, and chief executive office of CBI. There is no doubt that Bill Pogue has had and continues to have a fine career with CBI.

Because of his experience in the construction industry, Bill Pogue's testimony before this subcommittee deserves serious consideration. During my two-and-one-half year tenure on the Education and Labor Subcommittee on Labor-Management Relations, which has already considered the House counterpart to S. 492, Bill Pogue has advised me closely on this issue. I share his assessment that this legislation will do more harm than good to our construction industry and its employees. After listening to Bill Pogue's testimony, the members of this distinguished panel should reach the same conclusion.

I thank the chairman for allowing me the opportunity to introduce Bill Pogue before this hearing.

Senator METZENBAUM. Please proceed, Mr. Pogue.

Mr. POGUE. Mr. Chairman and Committee members, I am Bill Pogue, Chairman of CBI Industries. Bob McNeily, Labor Counsel for CBI is here with me. I appreciate the opportunity to speak to you today on this important issue. I have submitted additional written testimony which I would like made a part of this record.

Senator METZENBAUM. It will be included in the record.

Mr. POGUE. Thank you.

CBI Industries is involved in heavy construction, industrial gases, water treatment, and oil related businesses. Our corporate family is therefore made up of an industrial gas company, a water treatment company, and an oil and gas company, as well as two construction companies. That is, CBI Industries is the parent of five or so companies, not only the parent of a union construction and an open-shop company.

On the construction side, I would like to familiarize you with one of our company's products, one of the products that is probably the most visible in the United States. You have pictures with you of four elevated water tanks. These tanks are designed, fabricated and constructed by our companies, and you will see them dotting the landscape of the United States and many overseas lands.

Senator METZENBAUM. Tell us about the one that has got the pineapple construction.

Mr. POGUE. That was built in 1927 for Dole Pineapple Company in Hawaii and it is still there.

Senator METZENBAUM. Great picture, great concept.

Mr. POGUE. Thank you.

Senator METZENBAUM. It was built with union labor at that time?

Mr. POGUE. In Hawaii, I do not know, Senator. I really do not know.

Senator METZENBAUM. All right.

Mr. POGUE. We also build vessels and storage tanks for the oil and chemical plants of the United States and around the world. Our company will be 100 years old in 1989.

For the last 50 or so of those years, we have been an employer of people in the Boilermaker Union as well as other unions. Much of our company success has been due to our working with the Boilermakers and with the other unions. We are continuing and hope to continue this successful relationship.

My point here is that by being a multi-holding company, with one of our companies being an open shop, does not mean that we are taking work away from our union company. Although we might be considered double-breasted in the technology used here today, I emphasize that we are multi-breasted, with five or more subsidiary companies, all with stand-alone capability with regards to their management, sales forces, manufacturing and construction facilities, labor and personnel policies, and profit and loss responsibility to the parent corporation.

Senator METZENBAUM. Geographical area?

Mr. POGUE. Somewhat, somewhat geographical.

Senator METZENBAUM. Are they all in the same geographical area, is my question.

Mr. **Pogue**. They cross in some areas and not in some others, mainly in the Sun Belt is open shop, in the Northeast it is mainly union, so the geographic area is somewhat overlap in some areas.

Senator **Metzenbaum**. So the new non-union operations in the southern portion, are you leading me to believe, are not actually competing for jobs with the union operations that you have in the North?

Mr. **Pogue**. That is correct.

Senator **Metzenbaum**. Is there any competition in the Northeast? I will give you extra time for this. Is there any competition in the Northeast between your union and non-union operations?

Mr. **Pogue**. In some areas there is, yes, sir.

Senator **Metzenbaum**. Please proceed.

Mr. **Pogue**. We set up CBI Industries as a holding company just described to respond to the various marketplaces in which we operate. None of the companies were set up to avoid our responsibility to our existing contracts with unions. The holding company was set up to respond to the dictates of customer requirements and the dictates of the market in which we found ourselves. We set up our open-shop company to be able to respond to the demands for the type of work and to the demand of certain customers for such a company. We need to be able to respond to opportunities in both markets.

The survival of CBI Industries and its employees should not depend on whether or not a company wears the union label. Our survival—and, by the way, survival is not greed unless a man searching for air to breath is greed. Our survival should depend on whether or not we are competitive, whether or not we respond to the customers' needs and whether or not our financial performance earns us the right to work in the marketplace.

In summary, we are not only a double-breasted company, we are a multi-faceted company, with several stand-alone entities. Each of our companies is on a stand-alone basis, including the two-contracting companies.

I am responsible for each of those companies mentioned on a profit and loss basis, and I in turn am responsible to our shareholders for the general health of our company. Our structure permits us to operate completely within NLRB guidelines, and we feel we do so in a positive, competitive way.

I feel that the passage of this bill would inhibit competition in the construction industry and thus be detrimental to the cost of industrial plant construction. Equally important, I feel its passage would limit the American construction worker's opportunities for employment, therefore I respectfully ask that this bill not be passed.

Thank you.

[The prepared statement of Mr. Pogue, with an attachment, follows:]

STATEMENT OF
WILLIAM A. POGUE
CHAIRMAN, PRESIDENT AND CHIEF EXECUTIVE OFFICER
CBI INDUSTRIES, INC.

HEARING BEFORE THE
SUBCOMMITTEE ON LABOR
COMMITTEE ON LABOR AND HUMAN RESOURCES
UNITED STATES SENATE

ON

S.492, THE CONSTRUCTION INDUSTRY
LABOR LAW AMENDMENTS OF 1987

JUNE 4, 1987

Mr. Chairman and members of the Senate Subcommittee on Labor, my name is William A. Pogue, and I am Chairman, President, and Chief Executive Officer of CBI Industries, Inc. CBI Industries, Inc., which is headquartered in Oak Brook, Illinois, has major business segments in contracting services, industrial gases and investments. We operate in the United States, its territories and possessions, and throughout the free world.

For the last 5 reporting years, CBI's revenues have averaged approximately $1.2 billion. Over the last three reporting years, approximately 66% of our revenues have been generated in the contracting services segment. In 1984 Liquid Carbonic Corporation, a major supplier of carbon dioxide and other industrial gases, became a part of our corporate family. Before that time virtually all of our revenues were generated by what is now the contracting services segment.

CBI Industries, Inc. had its corporate beginning as Chicago Bridge & Iron Company, which was established as an Illinois corporation in 1889. Over the almost 100 years of our existence we have been a leader in the design, fabrication and construction of metal plate structures and related systems. We have enjoyed a reputation as a "can do" company which is always willing to go where the work is and upon whom our customers can depend absolutely.

I have requested the opportunity to come before you today to testify in opposition to a specific proposal -- S.492, The

Construction Industry Labor Law Amendments of 1987. My testimony is intended to address the practical effects of this legislation. For those members of the Committee who are interested in specific legal technicalities of the bill, I would refer them to the Legal Analysis prepared by the National Coalition to Defeat H.R.281/S.492.

As a contractor and businessman who has been involved with the construction industry for my entire career, I am troubled that Congress would consider legislation that would prohibit "double breasting" in the construction industry. Such legislation would effectively eliminate legitimate dual shop operations and force construction companies into unwanted and unnecessary contractual agreements while infringing upon individual freedom of choice and opportunity.

CBI Industries, Inc. is but one of many such "double breasted" companies which have organized and which operate separate construction units to serve customers in the two distinct markets which presently exist in the U.S. - union and open shop. Our decision to operate in this manner was dictated totally by our customers and conditions in the construction marketplace.

CBI has, over its history, enjoyed an excellent working relationship with the building trades unions and much of our success can be directly attributed to this relationship. However, as the 1970's unfolded, union construction costs were approaching all-time highs in the U.S. and competitive forces, dictated by our customer requirements, began to make their presence felt in many of our traditional markets. As an example, Chicago Bridge & Iron for many years had been dominant in the supply of water storage tanks, particularly of the elevated variety which dot the landscape of much of our countryside. By the early 80's, our market share for these structures had dwindled to virtually nothing.

In spite of our best efforts, it became quite obvious that we were unable to compete in public bidding with the open shop contractors. Although we continued to pursue this work aggressively, our union contracts, with their restrictive work rules, virtually precluded Chicago Bridge & Iron from obtaining this work.

CBI Industries' management was forced to consider the several organizational alternatives which could restore us to a competitive position in all of our construction markets. In 1979, CBI Industries, Inc. incorporated in the State of Texas a wholly owned open shop subsidiary now named CBI Na-Con, Inc., to operate in those areas of the U.S. where it could best serve those customers which constituted the open shop market.

In 1985, CBI Industries, Inc. further reorganized its worldwide contracting services segment with the formation of CBI Services, Inc., a Delaware corporation, as a domestic union construction company. Both construction subsidiaries, CBI Services, Inc. and CBI Na-Con, Inc., are separately managed and are related only through their membership in the CBI Industries, Inc. corporate family.

CBI Services, Inc.'s corporate management staff is located at Oak Brook, Illinois with construction divisions headquartered in Fremont, California; Kankakee, Illinois; and New Castle, Delaware. Total current employment approximates 2,000, including 1,500 hourly rated employees who work at numerous construction sites throughout the United States and its territories where union construction is desired.

CBI Na-Con, Inc.'s corporate staff is also located in Oak Brook, Illinois with construction divisions headquartered in Fontana, California; Houston, Texas; and Norcross, Georgia, with satellite operations at Plainfield, Illinois and Wayne, Pennsylvania. Current employment is roughly 2,600, including 2,000 hourly rated employees located at numerous construction sites where open shop construction is desired. The above employment figures do not reflect subcontractor employment.

CBI Services and Na-Con have separate management, and each company has a separate board of directors. Each has a separate sales force. They have separate accounting functions. They have separate supervisors and employees. The two companies maintain separate payrolls, and separate wage and benefit programs. Each entity has its own labor policies and personnel function. In short, each company operates separately on a day-to-day basis to pursue work in and to service two separate markets.

CBI Services is signatory to a national labor agreement with the National Transit Lodge of the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers. Article I, Paragraph A of this agreement makes it clear that it covers all construction work within the Boilermakers' jurisdiction performed by CBI Services in the United States. Article IV, Paragraph A provides that as a condition of employment all employees of CBI Services covered by the agreement must become and remain members of the Brotherhood. Other provisions make it quite clear that the bulk of CBI Services' employees must be referred through the hiring hall. Copies of these portions of the agreement are attached to this statement.

Under the terms of S.492, this contract would be applied to CBI Na-Con, even though neither Na-Con nor its employees agreed to the contract. If this bill were enacted, many of Na-Con's employees would be required to join the Boilermakers Union in order to keep their jobs. In many instances, they would be required to go through the union hiring hall to obtain future work. The referral rules of most hiring halls are such that nonunion members are usually referred only after union members are. The effect of this bill would be in many instances to replace open shop workers with union members. All this would be done without affording the open shop workers a say in the matter.

S.492 presents a serious dilemma for CBI Industries and its construction subsidiaries. Do we simply close Na-Con altogether and forego the open shop market? Or, do we close our union company and forego the union market? None of these choices represents an acceptable resolution of the dilemma. Recent history has taught us that union contractors cannot successfully compete in those markets where Na-Con currently operates. CBI Services, as a union contractor, would not be able to compete in these markets. On the other hand, our union company has enjoyed a fruitful relationship with the unions for many years and we would very much like to continue that relationship. What choice will we make? I honestly cannot say. I do not see why we should be forced to make a choice. I hope that we will not be required to.

Having pointed out the specific dilemma with which we are confronted by S.492, I would like to address just a few of the other problems with this bill.

At the time this bill was introduced, unions claimed that construction companies simply could "walk away" from pre-hire agreements into which they had voluntarily entered. Although this assertion was substantially incorrect, a recent decision of the National Labor Relations Board has resolved all doubt as to that issue. Under current law, as in Section 2(c) of the bill, a pre-hire agreement is binding throughout its term and may not be repudiated unless the union is decertified by a vote of the employees. Under the unions' interpretation of S.492, however, construction companies would be required to continue to deal with the union after the expiration of the pre-hire agreement, even though the union never established that it represents the employees of that company. Thus, under the unions' interpretation, S.492 would change "pre-hire agreements" from voluntary relationships permitted by Congress since 1959 into compulsory relationships required by Congress.

The bill would also greatly expand the opportunities for unions to picket construction employers. While one may debate semantics, the bill's overly broad, all-encompassing definition of "single employer" would put in place the concepts of "common situs" picketing. The bill would allow a union to picket a business entity sharing any direct or indirect common control on a construction site with the contractor subject to the primary dispute. Thus, the control typically exerted by general contractors or construction managers, could impose "single employer" status on subcontractors on any construction site and, thus, enmesh once neutral employers in each other's labor disputes -- a form of "common situs" picketing. Also, because single employer picketing is lawful wherever the single employer is doing business, those formerly separate contractors then would be subject to "multi-situs" picketing.

The bill's definition of "single employer" would modify each remaining section of the National Labor Relations Act, including its secondary boycott provisions. The bill would sweep previously separate, legally independent contractors within the expanded definition of "single employer," thereby removing their secondary boycott protections and subjecting them to picketing.

I am aware that the language of the companion bill in the House, H.R.281, has been modified somewhat, from that which is contained in S.492. However, we do not believe that these changes substantially alter the effect of this legislation.

Further, since collective bargaining agreements would be automatically applied by operation of law to some open shop operations, the bill also would eliminate the nonunion construction worker's freedom to choose whether to be represented by a union, or by which union. The result is compulsory unionism. In many cases, these employees would be required to join unions as a condition of their employment. Even in Right-to-Work states, collective bargaining agreements could force a nonunion construction worker to seek job referrals through a union hiring hall.

In addition, this bill would seriously impact the ability of United States industry to compete in the world marketplace. The cost of construction is a major component in the total cost of manufactured goods. Construction users, the customers of contractors, should have available to them a full range of construction services in order to obtain the maximum return for their construction dollar. This bill would limit full access to these services. The many users of construction who are opposed to this bill can better advise you on how it will impact on their costs, and I will not go into it here. However, it would be counter-productive to deny this flexibility to these customers of construction services at a time when they are struggling to combat foreign competition.

Finally, I would like to make some comments concerning the practice of double breasting itself. I have heard it said that this bill is intended only to prevent companies from setting up "sham" shadow corporations to evade their collective bargaining agreements. In the May 23, 1987 issue of the AFL-CIO News, it was stated:

> . . . union construction firms across the country have been evading federal labor laws and the terms of their union contracts by the practice of double-breasting: setting up non-union alter-egos.
>
> These phoney companies drain work away from the union operations and undermine the wages and benefits that construction workers have gained over the years.

If this bill were limited to the companies described above, I would not be here before you today. We do not engage in such practices, nor do we condone them. The bill goes much farther than that, however. It would reach companies such as those in the CBI family and many other of the most respected companies in the construction industry. For nearly a century CBI has built a reputation for outstanding service. We have worked with construction unions successfully for decades. We did not become a double breasted company in order to evade our collective bargaining agreements. We operate the way we do because we wish to maintain a relationship with the unions, not to avoid them. To the best of my knowledge, the other major double breasted contractors with whom we deal, and with whom we compete, operate in a legitimate manner in accordance with well established legal principles. I know that CBI does.

It is most distressing to be portrayed as an organization that has created phony and sham corporations, but this is exactly how this bill would treat us. A dual shop operation is not immoral, it is not unethical, it is not unfair. It is a legitimate response to a fact of life in the construction industry. There are two construction markets, and there is no legitimate reason why companies should not be permitted to compete in both of them.

I previously stated that if this bill were to become law, we would be forced to make a difficult choice. I do not believe that any choice we make would be of any benefit to the unions with whom we have contracts. If we were to lose our open shop operations, that work would not be taken over by our union company -- it would go elsewhere, to other open shop companies. On the other hand, if we were to lose our union operation, the unions would be deprived of yet another union contractor. Why the unions believe this bill would benefit them, I do not know. I do know that it would definitely harm our companies and their employees.

N.T.L.
ARTICLES OF AGREEMENT
Between the
INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP-BUILDERS, BLACKSMITHS, FORGERS AND HELPERS
and
THE EMPLOYERS SIGNATORY HERETO

N.T.L.
ARTICLES OF AGREEMENT

PREAMBLE

WHEREAS, The parties hereto have maintained a mutually satisfactory bargaining relationship in the work area covered by collective agreements between them which have been in effect over a substantial period of years; and

WHEREAS, the International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers and/or subordinate subdivisions thereof embrace within their membership large numbers of qualified journeymen who have constituted in the past, and continue so to do, a majority of the employees employed by the Employer herein;

WHEREAS, The Contractor and the Brotherhood recognize that this agreement must take into consideration the transitory nature of the work done by the Contractor; and

WHEREAS, The nature of many of the products of the Contractor is such that a sufficient proportion of skilled and trained workers is required to construct them safely, economically and well; and

WHEREAS, the comparatively short duration of most field erection jobs compels the skilled and trained workers to live a migratory life, which makes it impossible to localize such construction; and

WHEREAS, Local or area agreements, regulations and practices do not adequately provide for a strictly national approach to the problem;

NOW, THEREFORE, The Contractor and the Brotherhood do hereinafter agree to the following articles applicable to field erection work:

ARTICLE 1. Scope and Recognition

A. This agreement embraces all construction work coming under the jurisdiction of the Brotherhood in the United States

B. The Employer recognizes the Union as the sole and exclusive bargaining representative for all field construction, maintenance and repair boilermakers, helpers, learner helpers and apprentices employed by the Employer now or during the life of this Agreement with respect to wages, hours, and conditions of work.

C. Where membership is required under Article (4A) employees in the following classifications need not be members of the Brotherhood: civil, electrical and mechanical engineers, field inspectors, timekeepers, watchmen, water boys, messenger boys and office workers, provided they do not perform any of the work covered by the terms of this agreement.

D. It is further understood that the men on each job will not interfere in any way with the affiliation or non-affiliation of the employees of the Contractor's Customer or of the owner or with the employees of other contractors.

ARTICLE 2. Classification of Work and Manpower Ratios

A. All work in the erection of storage tanks, containment vessels, process tanks, surge tanks, penstocks, pit liners, scroll cases, draft tubes, gates, stacks and stack liners and all other work in connection with dams and locks, water softeners, water filter plants of any type, material, shape or pressure including but not limited to tower tanks, standpipes, swimming pools, reservoirs and other cylindrical structures shall be performed under the provisions of this agreement. The hire and assignment of men on the work as set forth above, shall be as follows:

1. The Foreman (Article 8) and the first five (5) men, including the Pusher (Assistant Foreman), shall be national transient boilermakers and the next five (5) shall be local boilermakers, if available and qualified.
2. Provided local boilermakers are available, national transient boilermakers and local boilermakers shall be hired alternately to maintain this ratio.

B. Tower Tank Erection. Due to the hazards and skill required, this work is excepted from the above provisions governing assignment of men and the Contractor shall determine for himself whether to erect such a structure with a crew composed entirely of national transient boilermakers or whether such crew shall consist of a partial crew of national transient boilermakers supplemented by local boilermakers.

C. All work on boilers and in connection with boilers (nuclear or fossil fired) including precipitators, uptakes, downcomers, heat exchangers, condensers, condenser boxes, casing and breeching or duct regardless of configuration and other appurtenances (of a non-cylindrical configuration) shall be done by local boilermakers under the terms of applicable Local or Area Agreement.

All work in connection with electrostatic precipitators, regardless of configuration, non-cylindrical scrubbers, non-cylindrical breeching, non-cylindrical duct shall be done by local boilermakers under the terms of applicable Local or Area Agreement.

D. The above classifications of work (2A, 2B, and 2C) and all other provisions of this agreement shall apply to dismantling, conversion, repair, demolition, and maintenance work except as otherwise provided in Addendum D, made a part hereof.

E. The Contractor may use a higher ratio of local boilermakers, provided the men are available. A higher ratio of national transient boilermakers may be used if competent local boilermakers are not available. Other employees may be used if neither local nor national transient boilermakers are available. However, in these situations, the Contractor shall contact the NTD Representative and so advise. Men employed on a job as provided herein shall not be replaced for the purpose of establishing the applicable ratios set forth above.

ARTICLE 3. Boilermaker Classifications and Referral of Men

A For the purpose of this agreement, national transient boilermakers are boilermakers by trade who customarily work in different parts of the country and local boilermakers are boilermakers by trade who customarily work in a local area.

B Local boilermakers shall be referred from the out-of-work list in accordance with the referral procedure of applicable local or area agreements. Local men when referred shall be qualified construction boilermakers on the primary out-of-work list of the local lodge. If the Contractor desires certain experienced and specially skilled men he may call for such men who, if available, shall be referred by the local business manager. Such requests shall be confirmed by wire or letter.

C. Selection of applicants for referral by the Union or initial employment by the Contractor shall be on a nondiscriminatory basis and shall not be based on, or in any way affected by, union membership, by-laws, rules, regulations, constitutional provisions, or any other aspect or obligation of union membership, policies or requirements.

There shall be no discrimination by the Contractor or the Union against any employee because of the employee's race, color, religion, sex, age or national origin.

D. Employees shall not be withdrawn from the Contractor's employ without the consent of the Contractor's foreman. However, if it becomes necessary to withdraw any employee, the Contractor shall have the right to replace such employee from any source.

ARTICLE 4. Membership — National Transient Lodge

A. All employees of the Contractor covered by this agreement shall, as a condition of employment, become and remain members of the Brotherhood. Application for membership must be made within the first thirty (30) days of employment. (This clause shall be effective only in those states permitting union security.)

B. All national transient boilermakers who are or become members of the Brotherhood in accordance with the provisions of Article (4A) shall carry their membership in the National Transient Lodge and shall be called "National Transient Lodge Members," also referred to as N.T.L.

C. The Brotherhood agrees to admit as National Transient Lodge Members employees of the Contractor who apply for admission according to the rules and regulations of the Brotherhood and not to expel or suspend any employee of the Contractor from membership except in accordance with such rules and regulations.

D. National Transient Lodge Members will not be required to deposit their traveling cards in or transfer their membership to any local union.

E. Members of a local lodge who leave the jurisdiction of their lodge to follow work covered by the provisions of this

agreement shall apply to their loca lodge for a traveling card which shall be deposited in the N.T.L. for the duratio of their employment with an N.T.L Contractor while in the jurisdiction o another lodge.

F. It is understood and agreed tha neither the Brotherhood nor any of it representatives will undertake to per suade National Transient Lodge Mem bers to change their employment t another Contractor or to become Loca Resident Members rather than Nationa Transient Lodge Members.

ARTICLE 5. Deduction Union Obligation

A. The Contractor agrees to deduc from the wages of all employees covere herewith the following applicable unio obligations as set forth in Items 1, 2 and hereunder in uniform amounts therewit established by the union on all work covered by Articles (2A) and (2B) of this agreement.

Item 1. Initiation or reinstatemen fees of an applicant for membership i five (5) equal installments startin with the first full weekly pay period o the applicant. This payment arrangement is for the convenience of the ap-

Senator **Metzenbaum**. Thank you very much, Mr. Pogue.

Now, Mr. Jenkins, we are very happy to have you with us.

Mr. **Thomas**. Good morning, Mr. Chairman and members of the Subcommittee. My name is Ralph Thomas, III, and I am Executive Director of the National Association of Minority Contractors, here in Washington, D. C. Accompanying me here today is Howard Jenkins, our Special Counsel. He is a former member of the National Labor Relations Board, having served as a member of that Board from 1963 to 1983, under appointment by both Democrat and Republican Presidents.

NAMC is a national trade association, established in 1969 to address the needs and concerns of minority construction contractors nationwide. NAMC is composed of primarily non-union subcontractors in the construction industry. Indeed, most of the 60,000 minority contractors in the United States are non-union subcontractors.

Mr. Chairman, we would like to thank you for everything that you have done for minority contractors. Our organization and you have agreed 99.9 percent of the time. Unfortunately, this time our position is clearly in opposition to S. 492 and its amended House counterpart, H.R. 281. Mr. Jenkins will now outline our position in more detail.

Senator **Metzenbaum**. I am supposed to get an award from minority contractors in Ohio in the fall. Are you going to take it away from me on this one.

Mr. **Thomas**. Because it is your birthday, we will let you keep it. [Laughter.]

Senator **Metzenbaum**. Mr. Jenkins, please proceed.

Mr. **Jenkins**. Thank you, Mr. Chairman.

It would take more than the allotted five minutes for me to properly indicate to you three points: First, that this association is not here to make debater's points. We are here seeking protection against being eliminated from the industry. We are talking true survival.

The history, as you well know, Mr. Chairman, of the unions which are proposing this change, the history of closed unions, restrictive admission practices, and discriminatory hiring halls, and I think, Mr. Chairman, that that history is so well known as not to require documentation.

The effect of that has been to limit job opportunities for blacks and other minorities in the construction industry and to virtually exclude black and other minority contractors from access to the building and construction industry, certainly, that sector of it which is controlled by unions.

As Mr. Thomas has indicated, the members of his organization and other minority contractors depends upon two sources for virtually all of their work. Those contractors who maintain open-shop portions of their business, who are willing to subcontract to minority contractors and provide them an opportunity to participate in this industry.

Second, those major contractors who through the major contract program conducted by the association monitors the opportunities for minority contractors to obtain access to the industry. If S. 492 were to be enacted, these fledgling business entities would simply disappear. They are not in a position financially and structurally to compete openly in the union sector, not that they do not pay wages that are comparable to the wages paid in the union sector, but because of the very things that one of the prior witnesses indicated to you, that the need for bonding, the need for financial and capital structure to compete and to be able to demonstrate that they are responsible bidders, those are the problems that have been generated by this long history, and it is for that reason, and it is a clear and concise reason for opposing this legislation.

I have been a member of the National Labor Relations Board and I have heard you undertake to obtain from a witness from the Labor Department who obviously knew nothing about what the Labor Board has done, and from others who either profess not to know or maybe do not know, but I know, I served on that Board for twenty years, four terms. And during my service on that Board I saw these cases as they began to come before it, and I was on the panel of the Board that decided the Peter Kiewit case, and I was on the panel that decided the case after the courts got through tampering with it and returned it to us to make a final determination. And I can assure you, Mr. Chairman, that the Labor Board has done its job, it has handled the sham and the subterfuge and the attempts by one to eliminate or to evade responsibility under the Act and under their collective bargaining agreement. The Board has done its job and done it adequately.

Finally, I would say to you, Mr. Chairman, that I do not think there is anything broke and I do not think therefore there is any need to fix it. But if Congress is of a mind to address as a national issue the elimination and the abolishment of double-breasted operations, then it ought to do it in context and not with this type of legislative approach which in my view is flawed by tunnel vision focused only on one segment and a very narrow segment, when it should recognized and be recognized by this Committee that the impact of any change in this area will be of a profound nature and will go far beyond the simple professed purpose of dealing with the double-breasted operations in the building and construction trades industry.

Thank you, and I hope you will read my written statement which goes into much more detail on all three points.

[The prepared statement of Mr. Jenkins follows:]

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TESTIMONY BY

HOWARD JENKINS, SPECIAL COUNSEL
NATIONAL ASSOCIATION OF MINORITY CONTRACTORS

PRESENTED TO

UNITED STATES SENATE
SUBCOMMITTEE ON LABOR
OF THE
COMMITTEE ON LABOR AND HUMAN RESOURCES

ON

S.492
THE CONSTRUCTION INDUSTRY LABOR LAW AMENDMENTS OF 1987

JUNE 4, 1987

RALPH C. THOMAS, III EXECUTIVE DIRECTOR	JAMES A. FREEMAN PRESIDENT

A FULL SERVICE MEMBERSHIP CONSTRUCTION ASSOCIATION
WORKING FOR A BETTER CONSTRUCTION INDUSTRY

Good Morning, Mr. Chairman and Members of the Subcommittee. My name is Ralph C. Thomas, III, and I am Executive Director of The National Association of Minority Contractors here in Washington, D.C. Accompanying me today is Howard Jenkins, Special Counsel for the National Association of Minority Contractors. Mr. Jenkins is a former member of the National Labor Relations Board (NLRB), having served as a member of that Board from 1963 to 1983 under appointments by both Democrat and Republican Presidents.

The National Association of Minority Contractors (NAMC) is a national trade association, established in 1969 to address the needs and concerns of minority construction contractors nationwide. NAMC is composed of primarily nonunion subcontractors in the construction industry. Indeed, most of the estimated 60,000 minority contractors in the United States are nonunion subcontractors. The position of NAMC is clearly in opposition to S.492 - the Construction Industry Labor Law Amendments of 1987 - and its amended House counter-part, H.R.281. Mr. Jenkins will now outline our position in more detail. He shall also draw on his experience as a member of the NLRB to describe for you the historical background out of which our position arises.

Good morning, Mr. Chairman and Members of the Subcommittee. My name is Howard Jenkins, Special Counsel for NAMC. In order to fully understand what is involved in this current legislative effort, I think it is useful to put things into an historical perspective. At a very early time the unions in the building and construction trades sought to maintain both a closed union and closed shop job opportunities. The contractors in the union sector of the industry cooperated in that effort because they were thus enabled to control the construction work that was being accomplished. Since the union sector of the industry dominated the commercial construction field, and the nonunion sector of the industry was limited largely to home building and small construction, there was very little competition between the two. Minority contractors were totally excluded from the competition and certainly from the union sector.

In addition, it should be remembered that union membership in the building trades unions was highly restrictive. Blacks and other minorities were systematically excluded from membership in the craft unions and thus excluded from job opportunities and advancement in the construction field. Although in recent years some changes have occurred, and Blacks and other minorities have been admitted to membership in the craft unions, the plain fact remains that at the same time that membership rolls were being opened, job opportunities were disappearing. I think it is fair to say that the number of Blacks who have been admitted to membership in the craft unions has been minimal, particularly when compared to the number of white unemployed members who are senior to them in terms of both union membership and job referrals through the union hiring halls. During my years of service on the Labor Board, I saw numerous instances in which the operation of hiring halls resulted in the referral of minority workers in ways that were inconsistent with a fair, non-discriminatory practice. The impact of national labor policies on the opportunity for minorities to enter the construction field as contractors is self-evident.

An understanding of these historical facts is critical to understanding why minority contractors today are in a developmental stage and are limited to the nonunion sector of the industry. Given these facts, survival dictates that the National Association of Minority Contractors strongly oppose S.492/H.R.281, the effect of which, irrespective of its intended purpose, would be to eliminate minority contractors from the construction industry.

Commencing about 15 years ago, we began to see technological changes in the building and construction industry; changes that tended to blur jurisdictional lines among the craft unions; changes that dramatically affected the cost of building; and changes that brought about a shift in the percentages of the respective sectors so that the union sector lessened and the nonunion sector increased. Particularly during the last ten years of my service on the Labor Board, I saw a great deal of growth in nonunion construction and a shift in the industry with the nonunion sector becoming larger and more important than it had been in earlier years.

As shifts and changes occurred in the economy, and as technological changes came about in the construction field, there began to be a greater entry of the nonunion construction companies into what had been an exclusive preserve of the union sector of the industry; and that, of course, brought about a number of structural changes. Many union companies, as they began to recognize the increased opportunities in the nonunion field, began to seek ways in which to compete in that field. There could not, of course, effectively be a crossover between the two -- that is, union contractors could not compete effectively in nonunion markets -- because first, the unionized workforce would not work on a job site with nonunion workers, and second, a contractor signatory to union contracts would bid on jobs based on the anticipated costs. There was quite a difference between the cost factors on the union side and the cost factors on the nonunion side. Thus, many union contractors decided to establish separate companies to compete in both the union and nonunion sectors, and it is there that this dual enterprise concept was fostered.

These companies were maintained legitimately as separate companies. They would not compete with each other. One would compete in the unionized sector and the other in the nonunionized sector. But as with all things, not everyone is honest and not everyone is straightforward in their dealings. And so, as a consequence, some contractors attempted to evade their obligations under a collective bargaining agreement by funneling work to a nonunion subsidiary and pretending that the two companies were totally separate. This, of course, was a sham operation and was both a fraud on the union with which it was dealing and was violative of federal labor laws.

So, this issue came to the Labor Board. As these allegations of sham and subterfuge came before us, the Labor Board dealt effectively with them. I think it's safe to say, and certainly accurate, that when charges and complaints came before us alleging that some employers were undertaking to use this dual structure to evade their obligations under collective bargaining agreements, we dealt with them on a priority basis. The Board issued decisions and the courts upheld those decisions requiring a remedy on the part of the offending employer, requiring him to complete the work in accordance with the union contract and, in many instances, awarding backpay to employees who had been improperly compensated and who had not received the wages to which they were entitled under the collective bargaining agreement. This issue of sham operations, however, is a separate question from the issue of whether dual operations by a common ownership is proper or improper.

As the law presently stands, there is nothing improper or unlawful about an employer who owns a contracting company which undertakes to compete solely within the union sector of the industry -- to do his bidding and his work in accordance with the collective bargaining agreement to which he is a signatory -- and at the same time to own a company which confines its efforts to the nonunion sector of the industry. For many this was a decision dictated by economics.

We entered an era some time ago where prefabrication of components and other changes in technology blurred the rather strict jurisdictional lines between various crafts; and under Supreme Court doctrine every contractor or subcontractor on a building site is regarded as a separate individual employer on that project, even though collectively they are all about the business of constructing the building, but one is an electrical contractor, one is a plumbing contractor, one is handling only brick work and another carpentry, and so on. Thus, the employees of each may constitute a separate appropriate bargaining unit.

Now, along comes the ultimate user of a building who determines that construction costs are important to him. At a time when the contractor could simply pass along whatever the costs were, costs were not as important a factor in determining how the construction company would conduct its business. But once costs became important, either because of changes in the economy or for a variety of reasons, then there had to be a way for the contractor to decide into which sector of the construction industry he was going to function. Many chose to function in both, and to do each separately through a different company.

It is there that we confront this current legislative effort If, as is the stated purpose of the legislation, it is to forbid and to prevent sham operations and efforts at subterfuge, I would conclude, based on my own experience at the Labor Board, that there is no need for it. Currently and consistently over the past fifteen years, the Labor Board and the courts have dealt effectively with those few contractors who attempt to evade their obligations under a collective bargaining agreement through the sham or subterfuge of pretending to establish a separate company which is not really separate, and between which the union company simply shifts employees and equipment and performs through the nonunion side of his operation work which he is obligated under a collective bargaining agreement to perform in accordance with the collective bargaining agreement with the union. The Board has dealt with that and has provided adequate remedies. And so, as the expression goes, "If it's not broke, don't fix it."

The National Association of Minority Contractors wishes to emphasize that, at this point in history, minority contractors are in an economic position brought on by the factors previously mentioned where they cannot afford to pay the wages and benefits and adhere to the costly work rules most construction trades unions presently demand. Thus, all of their subcontracting opportunities can be derived only from prime contractors who maintain an open shop. The Association currently implements a Major Corporation Program in which some of the country's largest and most respected construction firms participate. This program is designed to increase contracting opportunities for minority contractors. If those participating prime contractors were compelled to limit their activities to the union sector, they would no longer be able to provide such opportunities to minority contractors. Stated another way, most of these participating construction contractors -- contractors which have been the most sensitive to minority business participation in the construction industry -- maintain both a union company and a nonunion or open shop operation.

During my tenure on the Labor Board, we looked at the cases that raised the issue involving double breasted or dual operations in the construction field, and in my opinion, we dealt with them properly. Those who engaged in sham operations were found out and remedial action was taken. We, however, found nothing in the law that forbids legitimate double breasted operations such as those participating in NAMC's Major Corporation Program.

I am not here to debate the political question of whether Congress should or should not, as a matter of national labor policy, outlaw double breasted operations. That is a multi-faceted question that requires thoughtful consideration. What I am here to urge is that if there is a Congressional intention to forbid the continued operation of double breasted contracting then that issue should be addressed forthrightly and in context. If the purpose of S.492/H.R.281 is to abolish double breasting in the building and construction industry, then that issue should be put on the table and addressed in the context of its impact on the total national labor policy.

I would caution that history and experience in the labor relations field have taught us that it is usually unwise to attack a single problem in the labor relations field as a matter of national labor policy and, with tunnel vision focused only on that one segment of our national labor policy, remain oblivious to its impact on other segments of the national labor policy. In other words, if Congress is of a mind to address this issue squarely and to legislate that in construction there shall be no dual operations by a contractor, fine; but first it should recognize that the construction industry is not self-contained. Throughout our entire industrial economy, there are large employers who do not regard themselves as primarily in the construction industry -- they may be primarily in the hotel industry or in the automobile industry or in some other industry -- but they have a tremendous amount of construction work that has to be done. If they choose not to farm out that construction work to a contractor, but choose to perform that work in-house with their own employees or through a subsidiary of their automobile or hotel company, what Congress may be doing here may be much broader than it realizes. It may intend only to legislate with regard to contracting companies, but find that what it has done affects many, many other industries.

A second point is that at least from the standpoint of my experience in the field, national legislation in the labor relations field requires delicate balancing of competing interests. It has often been said that the function of the Labor Board, and the function of government generally in the labor relations field, is simply to provide a forum in which employers and employees, acting through their union if that's what they choose to do, may decide for themselves what kind of bargain they wish to strike -- i.e., how do they wish to handle the economics of their industry, or of their plant or their local operation? Rather than having government hand down by edict or by fiat that the balance shall be struck in a certain way, our experience in the private sector has been one of undertaking to keep government out of the decision-making as much as possible, and, instead, to set up a system in which the employer and the employees, or the employees' representative, can resolve their differences in ways best suited to them. One of the things to be guarded against is isolated problem-solving by the Congress.

If, however, Congress believes that dual enterprises in construction is an issue worthy of national attention and national legislative decision-making, I would urge that it be done in a context which allows consideration of the impact of that decision-making on dual employment generally. I would urge that it be done with the recognition of the impact that this may have on other aspects of national labor policy as, for example, the right to picket, the manner in which bargaining units are to be established, the aspect whether individual employers on the building and construction site are truly separate, independent employers or whether they should be regarded as all there to accomplish one goal, namely, to construct the building. Now these are matters on which reasonable people can differ and each can establish a legitimate basis for whatever point of view is put forward; but all of these points of view should be considered before any single aspect is definitively addressed.

One additional comment with regard to S.492/H.R.281 -- the changes that are here proposed are almost impossible to limit. If S.492/H.R.281 were enacted, it would necessarily affect a much broader group of employers than those we think of as construction companies. Employers who regard themselves as hotel operators, as steel companies, and as automobile companies, for example, will have large amounts of construction work which they themselves choose to perform or to perform through a subsidiary which is wholly-owned by them. The effect of this legislation may well cause them to become contractors for purposes of this statute.

Another aspect is that legislation of this type aimed at a specific section of our industrial economy soon finds itself followed by efforts to apply the same type of legislative change to other industries. First it's the construction industry, next perhaps the trucking industry, then perhaps one or two others that appear to be prime targets for this legislative approach; and it is for that reason also that I urge caution.

I urge that care be exercised to determine how far the Congress really wants to go in making such significant changes in our national labor policies. I urge that careful thought be given to the impact that such changes will have on current legislation which remains viable. I have often commented during my service in the labor relations field that we have people on both sides of the labor-management dispute arena whose background knowledge is rooted in the Wagner Act of 1935.

There are others who worship at the shrine of Taft-Hartley and believe that all legislative wisdom is to be found within the confines of the Act of 1947. Still others commune with Landrum-Griffin, enacted in 1959, and its subsequent amendments.

When I served as member of the National Labor Relations Board I frequently said that the Labor Board is implementing national labor policy, and since Congress chose not to repeal the Wagner Act when it enacted Taft-Hartley, and chose not to amend the Taft-Hartley Act out of existence when it enacted Landrum-Griffin, the Board must perforce be ecumenical and derive its knowledge from all three statutes. Congress has decreed that all three taken together collectively constitute our national labor policy. This, I think, the Labor Board has effectively accomplished not only in the single area which we are addressing today, but generally. I do not come here today, however, to cite lists of cases decided by the Board and to argue that these decisions are correct. Rather, I am addressing the issue of whether the problems raised by proponents of S.492/H.R.281 with regard to double breasted operations in the construction field require legislative change.

I again emphasize today that if legislative change is contemplated in this specific area, caution should be exercised to review carefully what impact such a change would have on the delicate balance in the labor management relations laws that has been crafted by the Congress. Before making such significant changes as the ones proposed here, the Senate should be convinced from its own examination through appropriate hearings and appropriate research what impact this is likely to have, and to determine in advance whether the collateral damage is worth the perceived gain.

From an acknowledged parochial viewpoint, speaking for 60,000 minority contractors, I can assure you that the demise of those business entities, fledgling as they are, would wreak havoc far beyond the proposed amendment to the National Labor Relations Act. The social and economic impact would be devastating. I urge that this legislative proposal be defeated.

That completes my testimony, Mr. Chairman. I am now ready to entertain any questions you might have.

Senator METZENBAUM. Thank you, Mr. Jenkins. I will have some questions for you before we are through.

Mr. Heckert, I listened to your statement with interest and I want to tell you that I do not go to any hearings any more where I do not hear someone tell me that this piece of legislation has to do with America's competitiveness. Every single piece of legislation we get around here—they tell me that we have to change the antitrust laws because of competitiveness, we have to change the Food and Drug Administration laws and the patent laws because of competitiveness.

I am uncomfortable with your testimony because what you are really saying is that to get lower wages we have got to compete with $1.46 or $3.00 an hour that is paid in Taiwan and Korea and Japan, and that is not the issue we are dealing with. We are dealing with integrity. We are dealing with the fact that if Du Pont makes a contract with somebody, with a group of its employees and their certified collective bargaining agent, do they engage in a sham to go out and do something with a non-union corporation specifically formed in order to evade—now, I am not saying avoid, I am saying evade its obligations under the contract.

Frankly, as I listened to you, you are really saying we have got to lower wages, it costs too much to build. And then I said to myself, maybe in order to compete we ought to lower Mr. Iacocca's $20 million salary, maybe we ought to lower some salaries at Du Pont and some of the other members of the Business Roundtable. If we are just going to bring down wages and that is the thrust in order to compete in this country, that is one thing, but that is a different issue than what we are dealing with here.

What we are dealing with here is integrity, is the obligation of contracts, and it is that issue that bothers many of us. My ranking minority member says that he agrees, that if you have a contract you do not then participate in the creation of a sham operation that is non-union, and you live up to your obligations.

I wish you would address yourself to that issue.

Mr. HECKERT. I would be very happy to, and let us start at the end where you say that you do not really understand whether or not there is a breach of contract here on Du Pont's part.

Let me assure you that there is not. Before this proceeding, I asked Charlie Brown, our head of engineering, if in all his experience in recent years ever came across an instance when he thought that double-breasting was an illegal operation. We to the best of our knowledge have never had a contract with a company that was playing games. Now, I certainly do not know of any. I do not know where this exists, but I will tell you right now that the double-breasting firms that we do business with are completely honorable. They do about 50 percent of our work and are very good.

Senator METZENBAUM. I am not saying they are not honorable. The question is that if you have a contract——

Mr. HECKERT. If we have a contract, we keep our contract.

Senator METZENBAUM. That is right, and——

Mr. HECKERT. I am talking about an entirely different question: Is this legislation going to result in our losing access to double-breasting contractors? If it does, it is an enormous disservice to this country.

Senator **Metzenbaum**. Tell me, you heard some testimony here today from the gentleman from Ohio who talked about a company that had a union contract, had been union for many, many years, and then literally formed another company which was found to be illegal, and then moved to a third company. That company was able to take over all of its business and the union operations were totally phased out. Do you think that is fair?

Mr. **Heckert**. Well, I am simply not a lawyer and I am not sure how much substance there is to any of these examples. I would submit that all people ought to keep their agreements. I am not sure that some of the problem is not that unions are unable to find anything wrong with the existing arrangements, and that disturbs them and they would like a law that is much more conducive to their point of view, but that is a value judgment and I do not choose to make it. I am talking about preserving for the consumers of this country who buy these services the right to have competitive bids on their jobs, all kinds of competitive bids. The most valuable suppliers of those services we have are double-breasted suppliers, people who run large, sophisticated, open-shop operations and large, sophisticated, high-valued union shop operations, and I think you are trying to take them away and I object to that.

Senator **Metzenbaum**. Mr. Heckert, if Du Pont can presently hire non-union contractors unrelated to union contractors, how would this bill make Du Pont or any other construction customer less competitive?

Mr. **Heckert**. If the proponents of this bill get what they want out of it, it becomes law and in fact, the unions have a stronger hand. For the very reason that they will be happy, we will be unhappy. Their rewards will go up and our costs will go up.

Senator **Metzenbaum**. That is it, it all relates to costs.

Mr. **Heckert**. Well, the costs have to do with the cost of people and the efficiency of people. You have to understand, Senator, that——

Senator **Metzenbaum**. Why doesn't Du Pont form a separate operation and get some cheap executives. [Laughter.]

Mr. **Heckert**. Well, you ought to look over our record and find out what we have done in the last few years about trimming our costs from top to bottom and maybe you would recognize that we have not been sitting on our duffs. We have done some of those things.

Senator **Metzenbaum**. I do not want my previous question to indicate that I am opposed to your executives being paid well for the work they do.

Mr. **Heckert**. Thank you.

Senator **Metzenbaum**. I guess what I am saying is that the thrust of your remarks is labor ought to be able to be bought cheaply and——

Mr. **Heckert**. I am probably more disturbed about what has happened to the working man in this country than half of the people in Congress, judging by your actions on international trade. Now, I really think that the working man has gotten a royal screwing in many of the actions that have been taken by the Senate and the House, but that is not the issue today. The issue is can the consumer of construction services buy competitively, that is the issue.

There is absolutely no question that your original premise is right, in order to be competitive there will have to be a reduction of income for all our people if we are going to hang religiously to the open market free trade concept. There is no option and the American people ought to understand that and its leaders ought to understand it.

Now, having embraced free and open markets as we have—and that is not wrong up to a point—we are going to have to accept the fact that we have got to get our costs within line. We reduced our roll by 35,000 in the last five years, we have cut layers of management in our plants from 7 to 4, we have reduced executive vice presidents and vice presidents all the way from top to bottom to get our cost structure down where we can be more competitive.

Charlie Brown has done a magnificent job in the construction industry, working with all kinds of suppliers of services, to get our costs competitive in that area. We build plants in Japan. We have experienced the joy of having projects come in early and under budget in Japan. Now, you know, if we are going to be competitive in this country and make investments in the U.S. that can compete worldwide with those investments overseas, we have got to get our costs down.

Senator **Metzenbaum**. But I want to——

Mr. **Heckert**. We would be very happy to work with the unions to do this, with open-shop people and under merit shop conditions, but we have got to get our costs down.

Senator **Metzenbaum**. I want you to know, Mr. Heckert, that the Japanese have come here and built a Honda plant at Marysville, it is non-union but it pays union wages, and Nissan has built at Smyrna, Tennessee, and one of the other companies has built in this country.

Mr. **Heckert**. I understand.

Senator **Metzenbaum**. The American workers are getting paid comparable wages to union wages, and I just say to you that I do not believe that the solution to our trade problems with Japan and Korea and Taiwan is to cut the wages of the employees, the working people of this country, because I am convinced that the American worker can out-work, out-compete, and out-sweat any worker in this world and you do not have to do it by cutting his or her wages.

Mr. **Heckert**. Well, we feel that way about our people, too, Senator, but let me tell you something, you are not quite right. We cannot out-work them, we cannot out-think them. We can compete with them on a reasonable and fair basis, but if you think we are so far ahead of them that we can ignore them as competitors just by putting in a little more sweat, you really do not understand.

Senator **Metzenbaum**. As I said to the Japanese Chamber of Commerce the other day when I spoke to them in New York, it is high time for them to recognize that we want to be able to sell our products in Japan, not just by Du Pont and others building plants in Japan, but sending the products that it makes, that General Motors makes and that General Electric makes and other companies make, and sending those products into those countries. There is no question in this Senator's mind that Japan and Taiwan and

Korea have not been receptive to permitting our products to be sold in their countries.

Senator Harkin, do you have any questions?

Senator **Harkin**. Thank you, Mr. Chairman. I just want to ask a question of Mr. Heckert. What was it you said the Senate has done to give the working man—I assume you mean the working men and women of this country—a royal screwing or something like that? Would you repeat your words?

Mr. **Heckert**. Those were probably intemperate words.

Senator **Harkin**. That is all right, I just want to know what you mean.

Mr. **Heckert**. What I am really saying is that I think our approach to governments in the last several years has been seriously flawed in two or three areas, and one is certainly the trade issue.

You know, we do business all around the world and we completely agree that a certain amount of trade worldwide is very beneficial and very desirable, and we ought to seek every bit of that kind of trade that we can get.

We also know what the differences are in behavior patterns in different parts of the world. We know, for example, that we can go to some countries and have 25 percent of our capital costs paid for by the government right now, up front, and no questions asked. You know, you talk about free trade, I do not know what your definition is, but mine says that that is a little suspicious. It is available and we take advantage of it and we must to be competitive, but we are not necessarily sanguine about it.

I think clearly one of the reasons we are not as competitive as we should be with others is that we have mismanaged our national economy. There is enough credit for that for every one of us in this room. Now, I share it and so do you.

There are a lot of things that we have got to stop looking at idealistically and look at more pragmatically. Now, we can go either way, but you cannot go both ways. If you really want to compete worldwide on a cost and quality basis, you have to have competitive costs.

Now, we take this position not because we have an argument with union labor; we use them with pleasure. They are good and we enjoy their services when they are cost competitive. Wages is not the only issue. It is wages and productivity and quality, and in many cases the union shop can win on that basis. Sometimes they cannot. What they have got to understand is that the open shops are getting better and better and the game is getting tougher and tougher.

Senator **Metzenbaum**. Senator Harkin, Senator Quayle had prerogatives. I did not mind yielding for a question.

Senator **Harkin**. Oh, I am sorry. I just wanted to find out what he was talking about specifically that Congress has done. I am still in the dark.

Mr. **Heckert**. Well, I will be glad to share that insight with you anytime you would like to sit down.

Senator **Metzenbaum**. Senator Quayle?

Senator **Quayle**. Thank you, Mr. Chairman.

Let me go back to what I think the issue is, and the issue that we are going to have to come to grips with is do we believe, as is currently allowed by law, that you can have double-breasted companies. That is the issue, not sham operations. I am opposed to that as much as the Chairman or the Senator from Iowa or anybody, and I think anybody that tries to circumvent the collective bargaining responsibilities or to go back on a contractual obligation is wrong. Those laws are on the books and the penalties and everything else ought to be enforced to the fullest. I have absolutely no sympathy with that type of operation, none whatsoever.

But what this legislation does is prohibit a company from being double-breasted, having a union operation and a non-union operation. That is what this legislation does and that is why I was trying to get the objective out of Mr. Georgine, whether he would allow a company to be double-breasted and, after going back and forth—and I think the record will speak for itself—he really did not want to see that happen, he didn't think that could be a working possibility without creating all sorts of problems from his viewpoint.

That is just a fundamental disagreement, because I think that you can and that is what I would like to get from these witnesses, a statement to that basic principle, of whether you can operate a double-breasted company and be able to fulfill the contractual collective bargaining obligations with a union and yet on the other hand have a non-union operation without basically taking work from the union operation and putting it into the non-union operation. That is the question that is before us.

Furthermore, we can, according to law and interpretation, get this prohibition in an area by the collective bargaining process. You can do that now. As a matter of fact, they have done it in Boston with the carpenters. They have entered into a collective bargaining arrangement where it prohibits double-breasting, and if that is okay for Boston, I have no problem with that.

I am sure not going to support a law saying they cannot do that, that they cannot enter into a collective bargaining process prohibiting double-breasting, but what I do oppose is the Congress begin to impose itself, in this area and saying that double-breasted companies are in fact hereafter verboten and we are not going to have them.

Now, I would like for each one of you to talk about how on a day-to-day operation, how we can have——

Senator HARKIN. Would the Senator briefly yield?

Senator QUAYLE. Yes.

Senator HARKIN. Excuse me, Dan, just yield on that. You are not questioning the right, the constitutional right of Congress to go ahead and change that, are you?

Senator QUAYLE. Oh, no, Congress can do it. Sure, you can do it.

Senator HARKIN. Okay.

Senator QUAYLE. I just think it is absolutely wrong for the Congress to begin to insert itself into what I think is something that you can——

Senator HARKIN. I thought you were saying that we do not have the right to do it.

Senator QUAYLE. Congress can do a lot of things. This I think is perfectly constitutional. As a matter of fact, Congress even does some things that are unconstitutional. I do not think this one is particularly unconstitutional. I think this is perfectly proper, that we can do it. I don't think it would be right.

I would like to get from each one of you how a double-breasted company can work without being and how it should work without being, as all of these allegations of being a sham and operating in an illegal way. Now, if it is an illegal way and a sham, my point has been—and I think Mr. Jenkins referred to this—it is illegal now. The problem is not the law. Perhaps there are some minor things that we—as Senator Metzenbaum pointed out, maybe there are some things that we can do to allow for better enforcement. I have no problem with that, of getting better enforcement of what I think the law is right now.

But I would like to get a description from you on how these double-breasted companies can operate in a fair, legal way and I think that is the issue that is before us.

Mr. **Heckert**. I think I have probably said all I should on the issue from our perspective. There simply is no problem. We do it all the time. If you want chapter and verse, Charlie Brown, the head of engineering, could give it to you, but it is simply not a problem. We deal with reputable people, we use both of their arms, and we know why we use each one when we pick it. So there is good, honest competition, depending upon the job and the nature of the bids.

I would like to point out, that out of 100,000 unfair labor practice cases that were examined by one branch of the construction industry, there were only 101 that dealt with this issue. That is a remarkably small number, if it is such a horrendous problem.

Senator **Metzenbaum**. Mr. Pogue, do you want to delineate the——

Mr. **Pogue**. I think that falls to me, Senator Quayle, because we do I hope and I feel run a fair double-breasted company, and I think it is a positive thing to me, as opposed to taking work away from the union. I look at it as our company being in on providing additional work for the merit shop people.

We were about to lose out on our United States market on those beautiful elevated water tanks that you see there in the Sun Belt. We were just about out of the business, and this is why I mentioned survival. We were competing with merit shop companies there, trying to, with union forces—and, by the way, let me second, it is not paying the workers less. There are work rules and further efficiencies that you can get in some merit shop locations.

We therefore got back in the business and we were able to then employ, a positive thing, employ merit shop people in the Sun Belt, whereas we had just about gone out of that elevated water tank business on a competitive basis.

So by not having the same personnel policies, by not having the same management, by not having the same sales force, by not having those things that are prohibited and properly so, we run our business we think on a fair basis, on a competitive basis. We enjoy good relationships with the unions and we enjoy good relationships with merit shops.

Senator **Quayle**. Let me ask you a question that the Chairman has brought up this morning, and that is the double-breasting operations within the same area. Do you have double-breasted operations that are in the same area, and how can you keep that separate? Because I think what the implication is is that it might be okay, you know, if you have, say, a union shop here in Washington but in Phoenix, Arizona you might have a non-union shop. But where the difficulty—and I think I sort of read into the Chairman's thinking that the difficulty may be of having a double-breasted company operating in Washington, D. C. Now, does that create more problems, to make sure that you have that separate management, separate sales, accounting, bidding and all of that?

Mr. POGUE. I think you have to get there to your specific customer need. For instance, in some areas in the Sun Belt customers want union work. Mainly, utilities want union workers. They go hand in hand with the unions to get their rate increase from the State. They have a very need for union support and therefore they want their jobs worked union.

Senator METZENBAUM. In the Northeast you have both union and non-union. How does anybody do business with the union shop when you have got the non-union probably at lower rates?

Mr. POGUE. Not at lower rates necessarily, Senator, just more efficient.

Senator QUAYLE. In other words the pay would be——

Mr. POGUE. The pay is usually about the same.

Senator QUAYLE. About the same.

Mr. POGUE. As a matter of fact, some of our merit shop people work more and get more pay, take more take-home pay than the union shops do.

Senator METZENBAUM. Would you submit to us the average wage rate and the benefits provided to the union company and the non-union company that operate in the same area. Would you submit that——

Mr. POGUE. You said wage rates and benefits.

Senator METZENBAUM. Yes.

Mr. POGUE. Wage rates, I would submit, are approximately the same.

Senator METZENBAUM. And the benefits?

Mr. POGUE. The benefits might vary.

Senator METZENBAUM. Would you submit the actual facts to us. In the Northeast is where you actually operate——

Mr. POGUE. And central, too, the central United States also.

Senator METZENBAUM. Would you give us the benefit of the actual facts in connection with the rates and the benefits in both of those areas where they——

Mr. POGUE. Do I have them now, Senator?

Senator METZENBAUM. No, I mean will you submit them to us after the hearing.

Mr. POGUE. Oh, sure. Yes, sir.

Senator METZENBAUM. Thank you.

Go ahead, Senator Quayle.

Senator QUAYLE. Also, I think it is somewhere in your testimony, I want to—in those particular areas, because I think it is going to be a very interesting point on how you are able to keep the integrity of those two corporations.

Mr. POGUE. We have two separate corporations. They have a different sales force. They have a different management. They have different personnel. They have different labor-management. So the salesmen are entirely different.

Senator **Quayle**. In the same area, because I think where the interest is is that perhaps you can have the—it would be very difficult or more difficult to have the double-breasted companies operated with that integrity in the——

Mr. **Pogue**. In the same area.

Senator **Quayle** [continuing]. In the same area and a distance, and I would like to further be able to delineate to show that you can in fact have legitimate, legal, respected double-breasted companies operating side by side without any subterfuge or sham corporations or whatnot. Maybe you could add to that.

[The information requested follows:]

CBI

CBI Industries, Inc.
800 Jorie Boulevard
Oak Brook, Illinois 60522-7001
312 572 7000

July 2, 1987

FEDERAL EXPRESS

The Honorable Howard M. Metzenbaum
United States Senator
United States Senate
Committee on Labor and Human Resources
Washington, DC 20510

Dear Senator Metzenbaum:

In order to comply with your request for a comparison of wages and benefits between the union and non-union construction companies of CBI Industries, it is first necessary to state that such information is not directly comparable. Inasmuch as all companies of CBI Industries are separate stand-alone entities, the management of each company has complete discretion in establishing the respective wage and benefit packages for employees. In addition to that preliminary obstacle is the inherent distinction that the benefit plans of the union companies are maintained and managed by the unions themselves whereas the non-union company's benefit plans are maintained and managed by the company for which the employee works. For example, non-union hourly employees of CBI Na-Con may participate in the same company sponsored medical plan as the salaried employees -- union hourly employees of CBI Services participate in their respective union's health and welfare plan. The same distinction is true for pension plans.

To further clarify the following information, I have directed CBI Industries construction companies to provided me with wage and benefit information which would pertain to welding as that is a skill classification that both companies employ. As set forth in testimony, our companies do not usually compete in the same marketplace nor necessarily for the same construction work. This fact further complicates direct comparison, but with that criterion in mind, and that which follows, I have been able to provide you with the following examples of construction work which our non-union construction company has undertaken and an analysis of corollary wages and benefits if such work were to be performed by our union construction company.

EXAMPLE - I: New Jersey

CBI Na-Con Contract
Glen Gardner Center for Geriatrics
Glen Gardner - New Jersey
250,000 Gallon Waterspheroid
Prevailing Wage and Benefit Determination
Made by the State of New Jersey
May, 1986

CBI Na-Con

A.	Hourly Wage	$19.18
B.	Hourly Benefits	38% of Gross Wages + .35 per hour

CBI Services

A.	Hourly Wage	$19.18
B.	Hourly Benefits	38% of Gross Wages + .35 per hour

This example appears to indicate identical compensation, but in actuality the non-union employee's take home pay is greater than the union employee because the directive of the State of New Jersey requires employers not paying the itemized employee benefits to a payee designated in a collective bargaining agreement to pay them directly to the employee on each payday as part of wages. Therefore, Na-Con employees receive $26.82 per hour versus the $19.18 per hour CBI Services employees would receive if CBI Services were to perform this work.

EXAMPLE - II: Texas

CBI Na-Con Contract
Longview, Texas
Polypropylene Tower
June, 1987

CBI Na-Con

A.	Hourly Wage	$13.00
B.	Subsistence per hour	$ 2.50

CBI Services

A.	Hourly Wage	$12.70
B.	Subsistence per hour	$ 2.50

The above example provides an illustration of the difficulty in comparing benefits as this is not prevailing wage rate work. Again, medical insurance for non-union CBI Na-Con hourly employees is the same medical insurance as that for the CBI Na-Con salaried employees. Medical insurance for hourly employees of CBI Services is that which is provided by the union's health and welfare plan. Pension benefits for non-union CBI Na-Con hourly employees are determined by the employee's contribution being matched by a company contribution of up to 3% of gross wages. Additionally, CBI Na-Con hourly employees' pension vest at the end of one (1) year and there is no forfeiture of employee contributions. CBI Services hourly employees contribute $1.00 per hour to the union's pension plan with vesting occurring at the end of ten (10) years.

One final note: the difficulty in comparing any wage and benefit package is further complicated by the fact that the unions routinely negotiate reductions in collective bargaining agreement wage rates on a job-by-job basis. Therefore, listed collective bargaining wage rates are not those that are necessarily in force on any given construction project.

I hope this information will assist the Subcommittee in their consideration of the Construction Labor Law Amendments Act of 1987.

Very truly yours,

W. A. Pogue (GMM)

W. A. Pogue
Chairman and President
of CBI Industries, Inc.

sjg

EDWARD M KENNEDY CHAIRMAN

CLAIBORNE PELL RHODE ISLAND
HOWARD M METZENBAUM OHIO
SPARK M MATSUNAGA HAWAII
CHRISTOPHER J DODD CONNECTICUT
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BARBARA A MIKULSKI MARYLAND

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DAN QUAYLE INDIANA
STROM THURMOND SOUTH CAROLINA
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HAYDEN G BRYAN MINORITY STAFF DIRECTOR

United States Senate
COMMITTEE ON LABOR AND
HUMAN RESOURCES
WASHINGTON, DC 20510-6300

July 15, 1987

Mr. W. A. Pogue
Chairman and President
CBI Industries, Inc.
800 Jorie Boulevard
Oak Brook, IL 60522-7001

Dear Mr. Pogue:

Thank you for your letter of July 2, 1987, which responded to my request for a comparison of wages and benefits paid by your union and non-union operations in the Northeast and Central United States.

Mr. Pogue, as you will recall, at the June 4 hearing I asked you whether your union and non-union operations competed for the same work in the Northeastern United States. You responded, "In some areas...yes." I then asked you to provide the Subcommittee with information regarding wages and benefits paid by these competing operations.

The information you provided to the Subcommittee lists actual wages paid by CBI Na-Con and hypothetical wages paid by CBI Services for projects in New Jersey and Texas. You state that no actual comparison is possible because "our companies do not usually compete in the same marketplace nor necessarily for the same construction work".

I am curious as to whether this statement is intended to modify your testimony before the Subcommittee that CBI's union and non-union operations do sometimes compete for the same work in the same geographical area. If you wish to amend your earlier statement to the Subcommittee, I would ask you to clarify this point in writing.

If you wish to reaffirm your testimony before the Subcommittee, then I would renew my request that you provide the Subcommittee with actual wages and benefits paid by CBI Na-Con and CBI Services for similar work in the same geographical area. In that regard, your letter suggests that CBI's non-union employees actually receive higher wages in New Jersey and Texas than CBI's union employees. As you know, other witnesses at the Subcommittee hearing suggested that a primary reason contractors form double-breasted operations is to enable them to offer lower bids for projects based in part on the lower wages they are able to pay non-union workers. If it is your position that CBI in fact pays higher wages to its non-union workers, you certainly will have made a new contribution to the debate on this issue.

I would appreciate hearing from you at your earliest convenience. Again, thank you for your cooperation.

Sincerely,

Howard M. Metzenbaum
Chairman,
Subcommittee on Labor

HMM:lkr

CBI
CBI Industries, Inc.
800 Jorie Boulevard
Oak Brook, Illinois 60522-7001
312 572 7000

July 29, 1987

87 AUG -3 PM 1:53

The Honorable Howard M. Metzenbaum
United States Senator
United States Senate Committee on
Labor and Human Resources
Washington, DC 20510

Dear Senator Metzenbaum:

I have received your letter of July 15, 1987, which regards my response to your request for a comparison of wages and benefits paid by CBI Industries' union and non-union construction operations in the Northeast and Central United States. I am not modifying my testimony before the Subcommittee as given at the June 4th hearing.

During Senator Quayle's questioning, you requested that I provide the Subcommittee with average wage rates and benefits for our companies operating in the same geographical area. The information I provided to the Subcommittee lists the actual wages paid by both CBI Na-Con and CBI Services for projects in New Jersey and Texas. The wage and benefit rates which I provided to the Subcommittee are those that are presently being paid in those respective areas for similar work in the same geographical area.

As you point out, my letter does indeed suggest that CBI's non-union employees actually receive higher wages in New Jersey and Texas than CBI's union employees. This is a point I tried to establish in my testimony on June 4th. As you will recall, I stated that operating double-breasted is not a matter of paying the workers less. In fact, I stated that the pay is about the same and that the non-union employee actually does get more take home pay.

I can understand where this testimony may appear to you to be a "new contribution" to the Subcommittee when proponents of the new legislation have maintained that the only reason for double-breasting is for the purpose of cutting workers' wages. I have tried, and I hope convincingly, to demonstrate to you that such allegations do not have a basis in fact.

One of the reasons I informed you that direct comparison of wages and benefits is difficult lies in the fact that the construction industry is characterized by the unique nature of each construction project undertaken. We do not have the luxury of producing a single product in a uniform way, but we must construct our projects as according to the customer's dictates, designs and desires. Please do not assume that companies which operate in the same geographic area necessarily compete head-to-head with each other on each project. In these areas, both union and non-union markets exist. Additionally, the benefit programs available to employees vary from company to company, and, as I mentioned in my July 2nd letter, the variation in benefit programs does not allow for an "apple-to-apple" comparison.

As I stated earlier in this letter, I do wish to reaffirm my testimony before the Subcommittee; the information I provided you in my July 2nd correspondence is in response to your request for the actual wages and benefits paid by CBI Na-Con and CBI Services for similar work in the same geographical area.

If I can be of any further assistance, please do not hesitate to contact me.

Very truly yours,

W. A. Pogue
Chairman and President
of CBI Industries, Inc.

sjg

Senator QUAYLE. Mr. Jenkins, you have listened to this discussion and you have got a lot of expertise. I would like for you to comment and maybe you can comment on this idea of a double-breasted company operating in the same area. Can they do it, not only do it, but do it and preserve the integrity. You know what the allegations are. You have seen this. And to be able to answer those allegations and say, "Senators, Congressmen, it just ain't so." Now, there are some out there that we know about, how do we get those, I think that is another question. But the idea that you cannot have a double-breasted company operating in a locality just from your viewpoint, I would presume you would say they can.

Mr. JENKINS. Not only that it can but it does. Right here in Washington, one of the major construction companies operates a union operation and also operates a non-union operation and they have different names and they operate out of different offices and they have different equipment and they have different personnel and they operate and everyone knows that the same individual is the controlling financial owner of both, but one operates under his name and the other does not.

Coming back to your earlier question, Senator—and I speak now from the standpoint of the Labor Board and its enforcement activity and the courts, because there is no difference between the approach the Board has taken to this issue and the approach that the courts have taken. Some have tried to cite the Peter Kiewit case as illustrative of how the courts have dealt with the problem in a way that was different from the way in which the Board dealt with it, but that just is not correct.

The correct fact is that the Court of Appeals which was giving a new twist to the set of standards that the Board had originally used to determine whether a sham existed or whether a legitimate operation existed, as one of the three judges on the Court of Appeals said in his opinion, he said, speaking for himself, he said, "We on the Court are doing nothing that the Board has not already done; we are just applying it to a set of facts a little differently from the way the Board would apply it." And this is the kind of thing you get in the enforcement area and, as you know, Senator, the Labor Board is not a self-generating entity. It cannot start anything.

General counsel, who has independent prosecutorial authority much as the U.S. Attorney has, makes a decision as to whether he is going to issue a complaint, and he does that on the basis of the same kind of judgment exercising that any prosecutor does. But until he makes a judgment and issues a complaint, the Board can do nothing. And as soon as the complaint is issued, then the Board deals with it.

One fundamental point that I think needs reemphasizing, because we are not here to debate a political question, we are here to debate a question of economics, here are some 60,000 minority contractors who, because of historical bent and because of the way in which the industry has been handled, are on the fringes and able to just dip their toe in and get access to such of the non-union construction as they are able to either win, beg or have allocated to them. And if this legislation were to be enacted, they could kiss all of their investments goodbye—they are through, they are out of business. These contractors are in no position to set any portion of these subcontracts for them unless they have the freedom to conduct their business either on the union side or as a non-union, and I hope that just as a matter of semantics, whoever thought up the term "double-breasted" had a real insight into what is sexy and what will sell, and if this were called what it is, dual operations—this is what we are talking about, this is what the Board used to talk about, and anyone who looks at our total industrial economy today and sees the mergers, the takeovers, a bottling company running a hotel, an airline owning some other type of company, if two companies both functioning in the building——

Senator METZENBAUM. Mr. Jenkins, could you wind up, please?

Mr. JENKINS. Surely.

Senator METZENBAUM. We arrogate to ourselves the right to filibuster. [Laughter.]

Mr. JENKINS. Touché. I just started to answer Senator Quayle.

Senator QUAYLE. Go ahead and finish.

Mr. JENKINS. Well, I can conclude rather quickly, Mr. Chairman. The point that I am trying to underscore is that the ability of any contractor to compete in any phase of construction work depends upon whether he wishes to restrict his operations to the union sector or to the non-union sector, or whether he chooses to compete in both. And so far as I am able to see, they have been able to compete in both, they do it legitimately and within the law and in a manner that did harm to no one.

Senator QUAYLE. Thank you very much.

Senator METZENBAUM. Thank you.

Mr. Jenkins, I have a couple of questions for you. First of all, I want to make it clear that I do not see this as being a minority issue because in my own State of Ohio there are—Burks Electric in Cleveland is one of the largest minority contractors in the State and it is union. Ozan Construction Company, based in Cleveland, operating throughout northeastern Ohio, minority owned, union. Sherman Smoot & Company, based in Columbus, also doing business in Baltimore and Washington, is minority owned and union. I have a list of 15 signatory minority contractors in the Washington, D.C. area alone who work with craft unions. I am advised that union contractors captured 90 percent of the work on D.C. Metro and they have had no problems meeting the 26 percent minority business enterprise participation level set for union contracts.

My question is this: Outside of one or two person operations, are most minority contracts in Ohio union or non-union, and what about most minority contracts in D.C.?

Mr. JENKINS. I think Mr. Thomas would have to answer that. I do not know.

Mr. THOMAS. The figure that you gave—I am aware of all those companies you name. In fact, I went to Harvard Law School with Mr. Ozan. And those are the cream of the crop companies. Most of the 60,000 minority contractors are non-union.

Senator METZENBAUM. Now, let me make this clear to you: This Senator 44 years ago recognized the problem that some unions did not admit minority members and introduced legislation in the Ohio General Assembly to prohibit discrimination based upon race, color, creed or national origin by unions, employers and anybody else who hired people. So my record on this issue is clear.

I would say this to you: I do not see this as a minority issue, but if you feel that in some way it might react negatively or hurt minority workers, I am prepared to offer and I believe to get accepted a provision banning race discrimination that might in any way result from the enactment of this legislation. That is an issue about which I am concerned, I share your concern, but I think that it is not relevant to the instant matter. But if you can show me that in some way it would hurt minority employment, I am willing to say that to construction trades, that you are going to have to accept this non-discrimination measure, and I have no doubt about it, that what they might have said 25 years ago is 100 percent different than what they would say today.

Mr. **Thomas**. Senator, the minority issue is the effect on minority contractors and workers. I think it has already been stated by Mr. Jenkins that if companies cannot be double-breasted any more and had to go one way or the other, it could have a devastating impact on minority contractors, and that is the—we are not looking for an anti-discrimination law or race provision. We are talking about the effect that this legislation would have, and I think what we are talking about here is that legislation is being offered under the guise of preventing sham operations, and what we are really talking about is the elimination of double-breasting, and if that is the issue that is what we should be discussing, rather whether double-breasting can be conducted legitimately or not. But what we are talking about, as Mr. Georgine already——

Senator **Metzenbaum**. That is the issue, whether or not double-breasting can be conducted legitimately or not, that is the issue. This hearing stands adjourned.

[Whereupon, at 12:11 p.m., the Subcommittee was adjourned.]

[Additional material supplied for the record follows:]

S.492

THE CONSTRUCTION INDUSTRY LABOR LAW AMENDMENTS OF 1987

Statement of the

AMERICAN SUBCONTRACTORS ASSOCIATION

to the

SUBCOMMITTEE ON LABOR
COMMITTEE ON LABOR AND HUMAN RESOURCES
UNITED STATES SENATE

June 4, 1987

AMERICAN SUBCONTRACTORS ASSOCIATION, INC. 1004 DUKE STREET, ALEXANDRIA, VA 22314
(703) 684-3450

THE CONSTRUCTION INDUSTRY LABOR LAW AMENDMENTS OF 1987

The American Subcontractors Association is a national trade association with 7,000 member firms representing all major construction trades in 55 chapters. In addition to its individual company members, ASA represents 15 other specialty trade associations with members of their own.

ASA is the only national organization that speaks exclusively for the interests of construction subcontractors, regardless of their trade specialty or labor practices. ASA is dedicated to improving general business conditions for subcontractors through unified and cooperative actions.

Over 80% of the commercial construction in the United States is performed by subcontractors. These subcontractors directly hire the specialized labor forces and directly purchase materials and equipment to perform this construction. Thus, ASA and its members have a direct interest in any legislative proposal that would impact labor-management relations in the construction industry.

This legislation, S.492, would have a devastating impact on the day-to-day operations of many of the firms operating in the construction industry. The bill is contrary to the just and sound national labor relations policies, boycott and antitrust laws so arduously and carefully developed over a thirty year period by Congress, the courts and the National Labor Relations Board (NLRB).

Doublebreasting and the Construction Industry

S.492 would significantly and fundamentally change current construction labor law. The legislation would effectively eliminate dual-shop construction companies by redefining and combining them into "single employers" for purposes of the National Labor Relations Act and collective bargaining agreements. Under current tested law, it is permissible for owners of construction firms to operate what are characterized as "doublebreasted" or dual-shop operations. Owners of construction firms may own and operate at least two separate, distinct construction companies, one that is open shop, and one that is signatory to collective bargaining agreements. This form of organization is legal as long as, and only as long as, day-to-day operations, management and labor relations, and general management are kept separate.

If separateness is not properly established and maintained, current law requires that the collective bargaining agreements of the one entity be extended to the other. Present balanced labor law requires signatories to labor contracts to abide by their collective bargaining agreements and further permits separate entities to operate independently.

The foremost problem with legislation that proposes to outlaw dual shop operations is that it is in violation of the provisions of the National Labor Relations Act which grant the right of self-determination to employees. Employees have the right to choose to be represented by a union or not. Merely because the employees of one company have chosen to be represented by a union does not mean that employees of a second company connected by some common ownership to the first should be forced to have that union as their representative.

The term "dual shop" is misleading because they are not actually dual shops. They are two independent employers with independent management, independent labor relations and different employees. This bill would simply deny the independent employees of an open shop company the right to vote for a union of their choice or the right to choose no union at all, as well as bestowing preferential treatment on the construction unions. Our national labor policy is built upon insuring the right of employees to self-determination in appropriate bargaining units as to their choice of unions or not to join a union. It is an abhorrent thought that a bill would be passed that would dictate that a labor agreement reached with a totally different employer in a different bargaining unit would be forced on the employees of the nonunion company without their consent or right to self- determination.

The successful legal operation of a dual shop requires a finding by the NLRB that the nonunion and the union companies are separate employers. If the companies do not maintain independent operations in the first place, they would not be considered separate employers and the nonunion company would have to deal with the union that represents the employees of the union company. To decide whether there is a single or a dual-employer relationship, the NLRB and the courts consider all the previously mentioned factors which will indicate whether the employers are either independent or allied. The courts and the NLRB balance all the indicators to see which outweighs the other.

The proposed legislation would effectively do away with the separate employer inquiry conducted by the NLRB and require that the two companies be treated as a single employer regardless of whether they are in fact operated independently. It forces employees who have not selected a union as their representative to be represented by the union. Unlike all other unions, the construction unions will not have to go out and organize from the "bottom up" to convince the employees to vote to designate them as their collective bargaining agent. With this legislation, the construction unions want to go to an existing union employer and force him to sign an agreement covering employees who they do not represent.

In addition, the proposed legislation usurps the power of the NLRB to designate an appropriate bargaining unit. Before the employer is required to include the employees of the new company within the employer's collective bargaining obligations to the union, it still must be determined that the two companies are an appropriate bargaining unit under Section 9 of the NLRA.

In most cases, dual shop firms do not compete against each other but actually compete in an open marketplace. Open-shop firms are increasingly working in markets that have been lost to union firms. Eliminating the dual shop will not recapture such work for the unions. Rather, open-shop firms will continue to do that work and increase their market share. The bill will not save a single union job. Doing away with the dual shop will not stop open-shop competition. The proponents of this legislation candidly admit that it would polarize a construction enterprise either totally union or non-union. The construction industry will have to go non-union in most areas where there is already substantial open-shop construction. This will occur throughout the forty states in which union construction has already collapsed.

If dual-shop entities perform work covered by the collective-bargaining agreements or are used to evade labor contracts, existing National Labor Relations Act requirements can resolve the problem with retroactive wage and benefit payments, application of the contract to the questioned enterprises, or obligating the employer to bargain collectively with the local union. See South Pacific Company v. Operating Engineers Local 627 (Kiewit), and J.M. Tanaka Construction Inc. v. NLRB, 675 F. 2d 1029 (9th Cir. 1982).

Pre-hire agreements

Although proponents of this bill have worked to give pre-hire agreements the status of mature collective-bargaining agreements through passage of S.492, this is no longer a valid reason to support passage of this bill. A pre-hire agreement is used when industry contractors and unions negotiate the terms of employment on a construction site before any employees are hired, and, in the past, it had been up to the union to prove majority status among the employees hired. Such pre-hire agreements, which would be unlawful prior to a showing that a majority of the employees favor representation by the union in other industries, are specifically permitted by Section 8 (f) of the National Labor Relations Act for agreements covering employees who are engaged in the building and construction industry. The unions have claimed that far too many employers are "walking away" from these agreements and that the situation would be remedied by passage of this legislation. Even though this claim had been essentially false and very misleading, a February 1987 decision by the NLRB has rendered the issue moot. As a result, pre-hire agreements are now binding throughout their term and may not be repudiated unless the union is decertified by an NLRB-conducted election by the employees. See John Deklewa & Sons, 282 NLRB No. 184 (Feb. 20, 1987).

Another major change announced by the Board in Deklewa is that a pre-hire agreement, entered into without majority status, does not carry any presumption of majority status upon expiration, so that the employer is under no obligation at the expiration of the pre-hire agreement to bargain with the union for a successor agreement. The Board's decision in Deklewa demonstrates its continuing efforts to adjust the legal rules of bargaining within the parameters of the National Labor Relations Act, and to provide for stability of labor relations and fairness to all parties (employers, employees, and unions) within the industry.

While the NLRB has now handed to the unions a major part of what this legislation is supposed to accomplish, the unions have now reinterpreted S.492 in this respect. Labor feels that the agreements should be binding beyond their expiration, which would take away any semblance of employee choice in the bargaining process. This process would be mandatory even though the union may not represent a majority of the employer's employees. As a result, the legislation would change such agreements from voluntary relationships permitted by Congress into compulsory relationships required by Congress. This new interpretation of Section 2(c) of S.492 offered by its proponents would constitute a radical change in existing law. Indeed, it is far from anything Congress intended when it allowed pre-hire agreements in 1959.

AFL-CIO Building and Construction Trades President Robert Georgine admitted in his congressional testimony on March 4, 1987, that the Board in Deklewa has overruled the R.J. Smith-Higdon-McNeff line of cases which allowed repudiation of pre-hire agreements. Yet, he characterized the new rules as "even more disadvantageous for unions" because "employers are free to repudiate their bargaining relationships even if the union can establish its majority status." (Testimony of Robert A. Georgine, p. 3). This is simply incorrect. Anytime a union establishes majority status in the conventional sense-- by securing employee authorization cards, petitioning for an election, and winning the vote-- an employer must bargain in good faith with that union. Indeed, with a pre-hire agreement being enforceable throughout its term, and elections being permitted during the term, and the mandatory hiring hall system being the norm in construction industry agreements, winning an election during the term of a pre-hire agreement should be a cinch for a building trades union.

All the union loses in Deklewa is the presumption of majority status after the term of the contract expires, a presumption which was attached not as a result of an employee election but simply as a result of an employer's pre-hire agreement for a limited term. The Board balanced the employer's continuing interest in freedom of choice against the need for stability and denied a system whereby agreements are clearly enforceable for a term but not enforceable thereafter unless majority status has been demonstrated by conventional methods. It is a balance fair to the unions and to employers, preserving the rights of employees.

S.492 would give unions leverage in the construction industry like they have never had it before. Once a contractor has signed a pre-hire agreement, he would be as locked into bargaining as a manufacturer with a union in his plant, with much less chance of a decertification petition being successful. If the union construction market declines, as some predict it will once S.492 eliminates mixed jobsites and polarizes the industry into all-union and all-nonunion sectors, the contractor locked into a bargaining relationship will be unable to compete. His employees, who never had the opportunity to vote on union representation, will lose their jobs. It is unfair to employers and employees alike.

S.492 and Right-to-Work States

There has been much discussion as to the impact of the anti-dual shop legislation on states with right-to-work laws, and, once again, the proponents of this legislation have been quite misleading. In a legal sense, this bill will not override any of the state statutes. In a practical sense, it will make many of them worthless. The basic intent behind right-to-work laws will be seriously undermined and will give unions an unfair advantage in those states.

If S.492 were to be enacted into law, it would apply collective bargaining agreements to open shop construction companies which are related to union companies. Many employers are required by their collective bargaining agreements to hire only through the hiring hall. This process, in effect, requires that employees obtain employment by being referred by the union, which has total control over who is referred. Although an employee need not be a union member to be referred, union requirements would effectively ensure that union members would be referred to jobs before non-members, and, since the union members elect the business agent who runs the hiring hall, it is indeed unlikely that non-members would ever be referred.

If this bill does become law, the employees of the affected companies in right-to-work states would, for all practical purposes, be required to join a union in order to find employment. The worst scenario would be if the union denied membership to those seeking it in order to find a job. The union could deny membership which would bar the worker from the apprenticeship programs that would give the worker the "qualifications" for referral. If the union takes this course, the worker would be shut out altogether.

Summary

The American Subcontractors Association's Board of Directors has strongly denounced this legislation as being highly disruptive to the industry and has voted unanimously to oppose it. It has hardly been demonstrated by the construction unions that doublebreasting has been burdensome to the unions.

Indeed, an analysis of a recent NLRB-conducted survey of its regional offices, covering the period from October 1983 through July 1986, showed that the unions filed fewer than two charges per state alleging doublebreasting abuses. And in over one-half of the states, there were no charges filed at all. Unions claim that they cannot get a "fair shake" with the NLRB and that it is a "kangaroo court." In reality, they were just handed a major victory by the NLRB in the Deklewa decision, which shows that there are other avenues that they can pursue, including going to federal court and arbitration. This issue should not and does not belong before Congress.

ASA strongly believes that this legislation has been designed help the unions maintain a stronghold within the construction industry when market forces have already determined otherwise. In this economic climate where "competitiveness" is the goal for all industries, why should the nation's largest industry be hampered in this respect? Passing this legislation would not only be foolish but also self-destructive.

ASA urges the Congress to reject S.492, the Construction Industry Labor Law Amendments of 1987.

NAM

Statement of
the National Assocation of Manufacturers
on
The Construction Industry Labor Law
Amendments of 1987, S. 492
to the
Subcommittee on Labor
Committee on Labor and Human Resources
United States Senate
June 4, 1987

The National Association of Manufacturers is pleased to contribute to deliberations on S. 492, the Construction Industry Labor Law Amendments of 1987.

This statement is submitted as a supplement to oral testimony delivered by Mr. Richard E. Heckert, chairman and chief executive officer of the Du Pont Company, on behalf of The Business Roundtable, U.S. Chamber of Commerce, and National Association of Manufacturers. Mr. Heckert's testimony accurately reflects the experience of NAM members and portrays the likely consequences should S. 492 be enacted. His comments directed to competitiveness are particularly relevant to the broader challenges facing U.S. business. We trust they, along with the observations of Messrs. Pogue and Jenkins, will be accorded serious consideration by the Subcommittee and the Congress.

SUMMARY

As detailed in the following, NAM strongly opposes S. 492. We are aware that advocates insist the bill is narrowly drawn and intended only to stem "widespread abuses" by construction employers who set up "sham", "alter ego" firms in an attempt to evade collective bargaining obligations.

Our reading of its provisions, however, leads NAM to conclude that the effects of S. 492 are far broader. The abuses alleged by proponents are already illegal under current law and we are not aware of any evidence to support the contention that the practice is either widespread or that current enforcement and sanctions are inadequate.

One real effect of S. 492 would be to ban the legitimate practice of dual shops or double breasting in the construction industry through an overly broad, new definition of "single employer" that runs counter to long established legal precedent. This, even advocates of the companion measure, H.R. 281, and their supporters now concede.

It would restrict the rights of non-union workers to choose whether they wish union representation. Under the bill, after a collective bargaining agreement is forced upon them, their only choice whould be to petition for a National Labor Relations Board-conducted decertification election. This is hardly the free choice guaranteed by section 7 of the National Labor Relations Act. Decertification is an illusory option at best given that it takes at least a long, frequently longer, time than representation elections, which Congress recognized in 1959 are not practical in the construction industry. Indeed, it was this recognition which led to enactment of section 8(f) permitting pre-hire agreements. To suggest that the freedom of open shop workers to determine their status by majority vote would not diminished by this legislation is simply not true.

There is also the much debated question of S. 492 with respect to picketing. NAM reads the provisions of the bill to expand permissible picketing and remove protections against secondary boycotts.

Enactment of S. 492 would, in NAM's view, impose unprecedented restrictions on the rights of construction employers to invest in and operate independent subsidiaries. Similar restrictions would be imposed on the rights of open shop workers to free choice. The changes would undoubtedly lead to an increase in worksite disputes and result, we believe, in increased delays and project costs for customers of construction services, thus reducing the ability of U.S. business to compete in world market and to provide employment opportunities for American workers.

BACKGROUND

To appreciate the significance of the changes proposed by S. 492, NAM believes it is first necessary to examine the characteristics and practices of the construction industry.

Historically, two distinct markets have evolved in commercial and industrial construction, open shop and union. During the past three decades, open shop contractors have become the dominant force in this industry, increasing its market share from less than 35% in the 1950s to approximately 75% in 1986. While there are a number of factors which have contributed to this shift, much of it has to do with the combination of wages and work rules that price union contractors beyond what customers in a very competitive market are willing to accept or pay. Open shops' rate of growth may slow, but theirdominance is not likely to diminish.

One consequence has been the emergence in construction of the dual shop or double breasted form of organization. This is a practice which originated outside construction and, contrary to characterizations advanced by proponents of S. 492, there is nothing evil or unethical about it. This form of organization is a rational response to market realities. In the construction industry, for example, unionized contractors saw that their traditional markets were declining. In an attempt to share in the growth sector, i.e., open shop, they purchased or established independent, subsidiaries that were not signatory to collective bargaining agreements. So long as, and only as long as, the subsidiaries are independently operated and the open shop arm was not established to evade a collective bargaining agreement, the subsidiaries have been held to be separate employers and a legal form of organization. The courts and NLRB have been consistent in their rulings based on long established precedent. Conversely, if the open shop subsidiary is found to be a "sham" or "alter-ego" of the union arm, established to evade a collective bargaining agreement, the courts and Board have been equally consistent in imposing sanctions.

The following examples illustrate the application of current law on the dual shops and hopefully, will dispel misconceptions. An investor owns company A, a unionized construction company operating principally in the Northeast. Wishing to expand into the open shop market, the investor identifies a non-union firm operating in the South that is doing very well and buys it as company B. So long as the two subsidiaries are operated independently and the company B doesn't siphon work away from the work traditionally done by the union arm, this dual shop organization is legal.

If, however, you change some of the facts, the result would be different. For the second case, assume the investor purchases the same firm company B. In this instance, though, the intention was to have work bid by company A--the union arm--but then have it performed by the open shop firm, company B, and/or have the companies competing against one another. Too, there is a regular interchange of employees and supervision between the two subsidiaries. In this case, company B would be considered by the Board and courts, under current law, to be an "alter ego" of the unionized subsidiary and, also under current law, to be illegal, e.g., established to evade a collective bargaining agreement. The case law in this area is clear and has been consistently applied, both in construction and other industries.

Congress provided special recognition to the transitory nature and lack of fixed worksites in the construction industry when it added section 8(f) to the NLRA as part of the Landrum-Griffin Act in 1959. This section permits construction employers and unions to enter into conditional "pre-hire" agreements on the terms and conditions of work prior to any employees being hired. In any other setting, this would constitute an unfair labor practice. Congress acknowledged the need for construction contractors to know in advance what their labor costs would be and have access to skilled craftsmen though union hiring halls. Although the terms of most pre-hire agreements became enforceable, it was well established that they were voidable, by either party, until majority status was achieved by a union. As discussed in another section, however, the issue of pre-hire agreements was the subject of a recent Board ruling. John Deklewa & Sons, 282 NLRB No. 184 (February 20, 1987).

PROVISIONS OF BILL

Sec. 2(a). Section 2(2) of the NLRA would be amended by adding a new term, "single employer," defined as two or more business entities in the construction industry "performing or otherwise conducting or supervising the same or similar work in the same or in different geographical areas, and having, directly or indirectly--(a) substantial common ownership; (b) common management; or (c) common control[.]"

Sec. 2(b). Section 8(d) of the NLRA would be amended to require extension of the terms of a collective bargaining agreement to all parts of the new "single employer" within the geographical area covered by the agreement.

Sec. 2(c). Section 8(f) of the NLRA would be amended to prohibit repudiation of pre-hire agreements and make them immediately enforceable without regard to the union's having or not having achieved majority status.

ANALYSIS

Single Employer. The concept of single employer for purposes of the NLRA is well established and has been consistently applied, across industry lines, for more than 20 years. Radio and Television Broadcast Union v. Broadcast Service of Mobile, Inc. 380 U.S. 255, 256 (1965). The Board examines four factors to determine if two companies constitute a single employer: (1) common ownership or financial control; (2) common management; (3) interrelationship of operations; and (4) independent management and control, particularly of the labor relations function. The greatest emphasis is placed on the last criterion, i.e., labor relations, but all factors are considered. Sakrete, Inc. v. NLRB, 332 F.2d 902, 905 n.4 (9th Cir. 1965); Don Burgess Construction Corporation, 227 NLRB 765 (1977), enf'd, 596 F.2d at 384 (9th Cir.), cert. denied, 444 U.S. 940 (1979).

S. 492, however, does not require examination of the totality of factors. Two subsidiaries would be found to constitute the newly defined single employer if there is any substantial common ownership or any common management or any common control. Unlike the provisions of section 2(b) of the bill, there is no geographic criterion limiting a finding of single employer status.

Under current law, a company not signatory to a collective bargaining agreement may nevertheless be bound by its terms if it is an "alter ego" of the unionized subsidiary company. Peter Kiewit Son's Co., 206 NLRB 562 (1973), remanded on other grounds sub nom.; Operating Engineers Local 627 v. NLRB, 518 F.2d 1040 (DC Cir. 1975), affirmed in part and remanded sub nom.; South Prairie Construction Co. v. Operating Engineers Local 627, 425 U.S. 800 (1976), on remand: Peter Kiewet Sons', Inc., 231 NLRB 76 (1977). Where single employer or alter ego status is established, the courts and Board have been consistent over the years in their imposition of sanctions, e.g., application of the collective bargaining agreement, award of backpay, retrospective contributions to union pension, health and wefare funds, and holding each subsidiary liable for the unfair labor practices of the other. Crest Floor and Plastics, Inc., 224 NLRB No. 185 (1985); and DMR Corp., 274 NLRB No. 7 (1985). Further, a finding of single employer status applies prospectively as well. Victor Block, Inc., 269 NLRB 424 (1984).

Application of Collective Bargaining Agreement. Section 2(b) of S. 492 would direct the terms and conditions of a collective bargaining agreement to all entities of the new single employer that fall within the agreement's geographical coverage. Under current law, the Board looks at the issues of single employer status and appropriate bargaining units separately. However, it is rare that the Board or courts find single employer status without also ordering employer-wide bargaining. Nevertheless, the Board currently examines each case to determine whether there is community of interest among employees of the two firms prior to application of a collective bargaining agreement.

Under the proposed legislation, however, the determination of appropriate bargaining units and community of interest would become irrelevant. A labor agreement would be summarily thrust upon non-union workers working within the geographic area of that contract. Thus, for contractors who are signatories to nationwide agreements, which is true for the largest contractors, this section would subject all their employees to a labor contract, without non-union workers having the opportunity to vote if they wished union representation. Their only choice would be to petition the NLRB for a decertification election, a cumbersome process and illusory recourse at best.

The effects of this are significant. Where union shop clauses are permitted, employees of the open shop arm would be required to join the union in order to keep a job and even then, there would be no guarantee of getting the job they formerly held. Even in Right-to-Work states, where union membership cannot be forced, employees would still have to be referred to a job by the union hiring hall. Despite requirements to refer qualified personnel to a job, without regard to membership status, it is not likely non-members would be referred frequently and if so, then only to menial jobs. Finally, there is the question of what constitutes the journeyman skill level. Even if a non-union employee has the requisite skills and experience, he or she might not be referred as a journeyman unless they graduated from a union apprenticeship program. Thus, he or she might be forced to take a significant pay cut while in "training" for skills already possessed, a tragic and costly waste of skills and expertise.

Pre-Hire Agreements. A fundamental tenet of the NLRA is that employees have the right to choose if they wish to be represented by a union and that an employer cannot recognize a union until it has demonstrated the support of a majority of workers. International Ladies' Garment Workers Union v. NLRB, 366 U.S. 731, 737-38 (1961).

When Section 8(f) was added to the NLRA in 1959, the legislative history is clear that Congress did not intend to diminish employee prerogatives to choose to collectively bargain or refrain from doing so. It is equally clear that section 8(f) does not confer on pre-hire agreements the status of collectively bargained section 9(a) agreements. Majority support was not presumed by section 8(f). R.J. Smith Construction Company, 191 NLRB 693 (1971). That a pre-hire agreement was voidable by either party prior to a union achieving majority support was well settled until the Board's decision in Delkewa. See also NLRB v. Local 103, International Association of Bridge Workers, 434 U.S. 335, 341 (1978). Notwithstanding Delkewa, it is equally well settled that an employer must honor obligations accrued prior to repudiation, with failure to do so subjecting the employer to breach of contract action under section 301 of the NLRA. Jim McNeff, Inc. v. Todd, 461 U.S. 260 (1983); Contractors, Laborers, Teamsters & Engineers Health & Welfare Plan v. Associated Wrecking Co., 638 F.2d 1128 (8th Cir. 1981); Western Washington Laborers Health and Sec. Trust Fund v. McDowell, 673 F.2d 1341 (9th Cir. 1982); and New Mexico Dist. Council of Carpenters v. Mayhew Co., 664 F.2d 215 (10th Cir. 1981).

The effect of section 2(c) has been rendered largely moot by Delkewa. That 4-0 decision held that section 8(f) agreements are not unilaterally voidable, by either party, in mid-term and reverses the Board's 1971 decision in R.J. Smith. Further, upon expiration of a pre-hire agreement, majority support for the union will not be presumed and either party may repudiate the 8(f) agreement. A union may not use strikes or pickets to compel the adoption of a successor agreement. S. 492, however, goes further and provides that a pre-hire agreement may only be repudiated after a decertification election conducted by the NLRB, without regard to the term of the agreement. Further, workers would no longer be able to request the employer to withdraw recognition. Under current law, the employer may withdraw recognition if, in good faith, it is believed that the union no longer enjoys majority support. Celanese Corporation of America, 95 NLRB 664, 672-73 (1951). Thus, while all employees currently enjoy the right to petition an employer to withdraw recognition, that option would be foreclosed to construction employees under this bill.

Expanded Picketing. Because of the breadth of the newly defined "single employer," the effects of S. 492 would extend well beyond prohibiting dual shops. For example, open shop contractors at a work site could be subjected to the collective bargaining agreement of the general contractor (who has "direct or indirect . . . control") or that of any other subcontractor ("performing . . . the same or similar work in the same or different geographical area").

Thus, the bills would reverse a 36 year old Supreme Court decision that held separate employers could not be forced into each other's labor disputes. Denver Building Trades v. NLRB, 341 U.S. 675 (1951). A labor dispute against one employer at a construction site would permit its union to picket all contractors at that site as a single employer. While semanticists may debate as to whether or not the bill provides for "common situs" picketing, S. 492 would unquestionably expand permissible picketing to a much greater degree than was contemplated by proposals defeated in 1977. Further, the bill would also, we believe, permit picketing at any other locations where any of the contractors or subcontractors are performing work.

Finally, because the definition of "single employer" would apply throughout the NLRA, the bill would effectively remove section 8(b)(4) protections for employers against secondary boycotts. That this is an objective sought by proponents is best illustrated by J.C. Turner, president of the Operating Engineers, in a April 1984 speech urging adoption of a resolution in support of a predecessor to S. 492. Lamenting the "good old days" prior to enactment of the Taft-Hartley Act in 1947, Mr. Turner said:

> "Now I don't need to tell you that that was a whole different world from what you are out there fighting today when you could shut down a job in New York to straighten up a job in another town." "32nd Convention Proceeding, International Union of Operating Engineers," Operating Engineer, June 1984).

NAM POSITION

NAM's belief in the right of free choice and our faith in the operation of competitive forces in the free market is central to our opposition to the Construction Industry Labor Law Amendments of 1987. Further, we believe the freedom of choice of all employers and employees would be jeopardized if the bill were enacted. Nevertheless, one must focus on the expressed objectives of this proposal.

Proponents have alleged widespread abuses by contruction employers of evading collective bargaining obligations through setting up sham, alter-ego open shop arms, practices that are violations of current law. NAM supports strong enforcement and sanctions against those whose practices violate current law but, contrary to allegations, proponents have failed to demonstrate the need for any legislation. Indeed, an analysis of a NLRB-conducted survey covering the period October 1983 through July 1986 indicates clearly to the contrary. Of the more than 100,000 unfair labor practices filed with the NLRB during that period, only 103 (or slightly more than one-tenth of one percent) allege the conduct which proponents claim the legislation is intended to prevent.

As to the question of NLRB's handling of alter-ego charges, it is obvious that the Board cannot act unless a charge is filed. The analysis showed that NLRB handling of double-breasted cases compares favorably with its handling of other unfair labor practices. Further, the experiences and the records of the Reagan and Carter Boards also compare favorably. Finally, the NLRB is more likely to find merit in charges alleging a single employer issue than it is in other cases. Thus, allegations that current law is ineffective are simply incorrect.

The bills would also severely restrict the rights of employers and employees. Limiting the rights of investors and companies to operate independent subsidiaries is unprecendented. Yet, this is the very effect enactment would pose. Construction employers would have to choose to be either all union or all open shop and thus be foreclosed from competing in both markets.

More importantly, non-union employees of the open shop subsidiary would no longer have the right to choose whether they want a union and if so, which one. Their only recourse would be to petition for a NLRB-conducted decertification election, a process which is subject to many delays and challenges. This runs counter to the NLRA's fundamental tenet that employees have the right to engage in collective bargaining activity and the corresponding right to refrain from doing so.

CONCLUSION

NAM believes that S. 492 offers a solution to problems that don't exist. The practices to which the bill's provisions are allegedly directed, e.g., "sham, alter ego" firms, and employers walking away from their collective bargaining agreements, are more than adequately addressed by current law. What advocates of this measure are attempting to do is mandate special treatment under the law for a privileged few by using government power to end the slide in market share of union construction firms.

But to do so would necessarily diminish the rights of others. S. 492 would prohibit individuals and companies from investing in separate, independently operated businesses. It would deny customers of the construction industry the range of market force created options they currently enjoy which provide cost-effective alternatives for their capital projects. To do so at a time when U.S. industries are fighting to regain a competitive posture in world markets and, in some cases, for their very survival, would be counterproductive. Likewise, non-union workers would have their right of free choice eroded. This would contravene the national labor policy in place since passage of the Wagner Act.

Labor law has been carefully fashioned over five decades to provide an appropriate balance between the rights and responsibilities of the parties--employers, employees, and unions. Current law and its enforcement already provide, NAM believes, a level playing field. That playing field would be significantly slanted if S. 492 is enacted.

From NAM's perspective, this otherwise complex issue can be reduced to one question: should the individual be permitted to exercise his or her right to freedom of choice? If you believe, as does NAM, in the importance of the right to choose, free of government pressure, we urge that you vote to reject S. 492. If, however, your inclination is to limit those rights, a vote for this measure will fully satisfy that objective.

NAM appreciates the opportunity to submit this statement and to contribute to the Subcommittee's deliberations on S. 492.

June 16, 1987

CONCERNED GENERAL COUNSELS OF MAJOR U.S. CONSTRUCTION COMPANIES

The Honorable Howard Metzenbaum
Chairman, Senate Labor Subcommittee
SH-608, Hart Senate Office Building
Washington, D. C. 20510

The Honorable Dan Quayle
Ranking Member, Senate Labor Subcommittee
SH-608, Hart Senate Office Building
Washington, D. C. 20510

Gentlemen:

The undersigned are General Counsels to many of the preeminent construction companies in the United States. While our structure, markets and day to day operations may vary, we are united in our opposition to HR 281/S 492, the so called anti-dual shop bill currently pending before Congress. Attached for your inclusion in the Senate Labor Subcommittee Record is our statement in opposition to this legislation which we hope you will consider during your deliberations on this very important matter.

JONES GROUP, INC.
Charles M. Burdette, Vice President
and General Counsel

MORRISON KNUDSEN CORPORATION
Samuel H. Crossland, Sr. Vice President,
Secretary and General Counsel

THE M. W. KELLOGG COMPANY
Thomas E. Giles, Vice President
and General Counsel

RESEARCH-COTTRELL, INC./
CUSTODIS-COTTRELL, INC.
Anthony J. Giuriceo,
Associate General Counsel

BADGER ENGINEERS, INC.
Alfred W. Glauner, Vice President
& General Counsel

KIEWIT CONSTRUCTION GROUP
Harley McDonald, Vice President-Legal

DILLINGHAM CONSTRUCTION CORPORATION
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cc: Members of the Senate Labor and Human Resources Committee

CONCERNED GENERAL COUNSELS OF
MAJOR U.S. CONSTRUCTION COMPANIES:
STATEMENT IN OPPOSITION TO HR 281/S 492

As chief legal counsel for a number of the major construction companies in the United States, we wish to express our views regarding the proposed anti-dual shop legislation from our special perspective as the nation's largest union contractors.

Our comments focus on our genuine concern that HR 281 in its original form and as amended will cause a fundamental violation of established principles of contract and labor law rather than achieving its stated objectives.

I. OUR POSITION IN THE INDUSTRY

Over the years, the companies we represent have engineered, managed, and built the largest construction projects in this country. Our work has ranged from dams to power plants; from airports to subways; from industrial plants to highways; and from office buildings to entire cities.

Domestically, we have paid billions of dollars in wages to our hourly employees who overwhelmingly have been members of the various Building Trades unions. We are collectively - and individually - among the major employers of unionized Building Trades persons in this country. This has been true historically and remains the case today. As such, we remain major funders of union pension plans and union health and welfare programs, and primary supporters of union apprentice training programs.

Thus, over the years our relations with the Building Trades have been marked by cooperation rather than confrontation. This working relationship - indeed partnership - has manifested itself in a plethora of collective bargaining agreements - National, Regional, Project and Specialty - with the various Local and International Building Trades Unions.

Despite this historic relationship with the Building Trades, we feel compelled to urge the defeat of this proposed legislation as unjustified in its conceptual underpinnings, unfair in its implementation, and anti-competitive in its forseeable effects.

II. WHY DO OUR COMPANIES MAINTAIN OPEN-SHOP AFFILIATES

Many of the major U.S. construction companies also maintain independently managed and operated open shop subsidiaries, although, typically, much smaller than their core union operations. In view of our historic relationship with organized labor, it is fair to ask why this is done.

The reason is elemental: to ensure our competitive survival in the market place for construction services. While specific surveys may vary, it is uncontestable that from 60% to 70% of the commercial construction projects in the United States are now being performed on an open shop basis; and this trend line has been steadily rising. For the largest construction companies in this country to ignore this significant and growing market segment would be to jeopardize our economic futures and - if the trend continues - ensure that we will not constitute the largest construction companies in the years to come.

It is important that Congress understands that it is ultimately the construction user who determines the division between union and non-union market share, and not the constructors themselves, who act only as suppliers to the demand thus set. Take as examples the new Toyota plant in Kentucky and the new Chrysler components plant in Alabama. Both projects were started open shop; both are now union projects. In each case, it was the owner or his manager - not individual bidding construction companies - who determined whether construction would proceed on a union or open shop basis. That the Building Trades well understood this reality is reflected in the fact that they brought their economic pressure to bear on the owners of these projects and not on the bidding contractors, who were simply sideline spectators in the power struggle.

The plain fact is that many owners, for reasons of competitive cost, geographic considerations, perceived productivity factors, or simple preference, build their projects on an open shop basis. Neither we nor this legislation can change that fact.

As wholly union construction companies, we were faced years ago with a simple economic choice in responding to this fact of life: (1) remain wholly union and forego in its entirety open shop construction work or (2) establish open shop subsidiaries for the specific purpose of competing for this work which was owner determined as open shop.

We chose the only rational option available: years ago we established open shop affiliates which were independently managed and operated in accordance with decades old legal principles (adopted by the NLRB with court approval), to compete in the open shop market that would otherwise have been totally foreclosed to us. In all candor, we did not perceive this action to be either anti-union or anti-American; and until this legislation was introduced neither did anyone else.

III. THE EFFECT ON MAJOR U.S. CONSTRUCTION COMPANIES IF THE HR 281 SUBSTITUTE AMENDMENT BECOMES LAW.

In our view there are serious flaws in the original HR 281 and continued in the substitute amendment reported out of the House Subcommittee on Labor-Management Relations. These have been adequately covered by other commentators and we focus here on the most significant effects on our companies and their open shop affiliates.

Because of their very size, many of the major U.S. contractors have long had national bargaining agreements with most, or all, of the International Building Trades Unions. These national agreements, as the term suggests, apply to all union construction work performed throughout the entire United States, as opposed to any one limited geographic area. Since the independent open shop affiliates of the major contractors are (a) obviously "engaged primarily in the building and construction industry;" (b) share "substantial common ownership" with their union affiliates; and (c) "perform (construction work) within the geographical area covered by a collective bargaining agreement" (i.e., anywhere within the United States), they would be covered, no matter where located, by the terms of either the original HR 281 or the substitute amendment.

Each of these open shop affiliates of the major U.S. construction companies would therefore, by legislative fiat, become subject to the terms of each of the 10 or 12 different national agreements to which its union affiliate was signatory. As a result, if the union affiliates keep their union contracts, the affected major construction companies would be stripped of the one vehicle which allows them to compete within the open shop construction market, i.e., their independent, open shop affiliate.

When all the dust has settled, these major U.S. contractors will have lost many millions of dollars already invested in their open shop subsidiaries; they will have lost their future ability to compete in the open shop construction market; competition will have been lessened among remaining competitors in that market; and not a single union job will be gained.[1] The sole beneficiaries of this entire exercise will be the remaining open shop companies and foreign competitors who rush in to fill the vacuum caused by our absence.

We are unable to see the fairness or wisdom of such a result.

IV. THE EFFECT ON EMPLOYEES OF OPEN SHOP SUBSIDIARIES

Obviously, one very dramatic and serious effect of HR 281 on the employees of these open shop companies is that, by legislative mandate, these employees will be forced to become union members. They will be forced to do so without being asked their desires on unionization, let alone being given the opportunity to vote by secret ballot election: an opportunity that is given to all other American workers.[2] As fundamentally unfair as this is, it may well turn out to be the lesser problem for these employees.

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[1] Supporters of the bill have characterized the national agreements as "miniscule." That may be true in terms of numbers of agreements but it certainly is not true in the terms of economic impact on the major U.S. constructors who hold them or the thousands of union workers they employ.

[2] Proponents of HR 281, argue that imposition of a labor contract on construction employees, without vote, is explicitly contemplated by the existing Section 8(f) of the National Labor Relations Act. The argument misses the point. The purpose and intent of 8(f) was to allow agreement to a labor contract before the work force was actually hired, so as to allow an employer to bid for work on the basis of known labor rates. That's why it's called a "pre-hire" agreement. That rationale hardly extends to employees who were hired months and years ago and constitute an established and on-going work force.

The only reason that the largest national contractors have invested the money, time, and effort to establish heretofore lawful, open shop affiliates is to participate, and compete for work, on open shop construction projects. If they could have competed for such work with their existing union companies they would have long ago done so and spared themselves these efforts. Take away now, by act of law, the open shop status of these subsidiaries, and their very reason for existing is also removed. The wholly predictable impact of this legislation is either the abrupt removal of these open shop companies from the marketplace and the loss of jobs for the thousands now gainfully employed by them, or withdrawal by the union affiliates from their union contracts.

This also would seem neither fair, desirable, nor in the national interest.

V. THE GOALS OF THE LEGISLATION DO NOT APPLY IN THE CASE OF THE MAJOR U.S. CONSTRUCTION COMPANIES.

Perhaps the most disturbing aspect of this debate is that the reasons advanced for HR 281's enactment simply have no application to our specific situation. Consider the most frequently advanced arguments:

HR 281 Will Properly Punish Employers Who Evade the Law by Use of Sham or "Paper" Corporations.

How valid this problem may be in other sectors is a question we leave to others of greater experience. But the argument is totally inapposite when applied to the open shop affiliates of major construction companies. These affiliates are the antithesis of sham or paper corporations. They are free standing corporations which have operated as such for years. They have existing and sizeable work forces, established wage and ERISA benefit programs, substantial investments in fixed equipment and rolling stock, and permanent corporate headquarters and staff. Indeed, many millions of dollars have been invested to capitalize their needs. They are separately managed, independently operated and employ thousands of hourly paid construction workers on scores of projects across the nation, valued in the aggregate in the hundreds of millions of dollars.

One may like or dislike the idea of open shop affiliates of major constructors; but one cannot, with a straight face, charge that they are sham or paper corporations.

HR 281 Does No More Than Ensure That Contractors Meet Their Contractual Obligations Fairly Undertaken.

The recurring, core argument of the supporters of this legislation is the claim that contractors routinely "evade" their contractual obligations. The often cited example is that of the employer who signs a contract, purporting to cover all of its operations, with a small, unknowing union and then later diverts certain of its work to a hidden shell company, whose existence was unknown to the union; all in an effort to evade its contractual obligations freely undertaken.

We do not support such conduct. However, this bill far overshoots such a narrow and limited problem.

We believe that it is axiomatic that contractual obligations fairly undertaken should properly be enforced as undertaken. This is not just fundamental labor law; this is fundamental contract law in any field of endeavor. Indeed, by its recent Deklewa decision, the NLRB has now closed the only real loophole limiting enforceability of such obligations in construction industry 8(f) prehire agreements. The fatal flaw of HR 281 is its inherent repudiation of precisely this principle.

National agreements between the Building Trades and major contractors have been negotiated, renegotiated, and periodically allowed to renew for years and years. These national agreements through the orderly process of negotiation are maintained exclusively between a company's union constructor subsidiary and the various International Building Trades. They are not signed by the parent or open shop subsidiary of the major contractor; do not apply to such a non-signator; were never intended to apply beyond the signatory entity to the open shop subsidiary; nor, over the years have they ever, in fact, been applied to such open shop subsidiaries.

Simply put, it is erroneous to assume, as does this legislation, that the International Building Trades are the unknowing victims of deception with regard to our open shop affiliates. Our open shop affiliates are of substantial size, openly maintained, have been in existence for years, and have their bids, contract awards, and general corporate doings regularly chronicled in industry journals of open circulation. Because of their sheer size of operation, we could no more "hide" our open shop subsidiaries from the International Building Trades than could Ford or Chrysler hide a new, open shop assembly plant from the United Auto Workers.

Under the guise of correcting a problem that, as applied to national contractors, simply does not exist, this legislation would inflict the injustice of applying, by operation of law, national agreements to entities to whom they were never intended, by knowing parties, to cover; and in fact, never have covered despite years and years of operation. This legislation does not require us to fulfill obligations to which we have previously agreed. This legislation imposes new obligations upon us wholly different from those to which we have previously agreed and of a nature as to which we never would have agreed at the bargaining table. This bill does not support the integrity of a contract. This bill legislatively abrogates the negotiated terms of a contract by, after the fact, adding a third entity which had never agreed to be bound. That, we submit, is neither good labor law nor good contract law.

The Unstated Purpose of Eliminating Open Shop Construction

In the guise of providing relief from purported double-breasting abuses, HR 281 apparently aims at elimination of major participants in the open shop construction market.

If Congress passes a law which, by its effects, prohibits Ford or Chrysler from making compact automobiles, it would not mean the end of the compact market; it would only mean that these companies could no longer compete in that market - to the benefit of other competitors. If Congress passes HR 281, it will not mean the end of open shop construction; it will, at most, mean that companies whose union affiliates are signators to union agreements can no longer compete in the market - to the benefit of other open shop companies.

The Claimed Drawback of Owning Both Union and Open Shop Entities

A final recurring theme sounded by advocates of HR 281 is that it is "wrong" for construction companies to operate both union and open shop entities; they should choose one or the other but not both.

We admit to puzzlement with such an argument. There is nothing in the existing labor laws which prohibits an employer in any industry from owning or operating both union and open shop companies in that same industry; or, indeed, operating the same company as union and open shop in the same business or the same geographic area. Large manufacturing companies, for example, frequently operate some of their plants on a union basis while simultaneously operating other plants on an open shop basis. This statement is true of the great majority of the Fortune 500 companies. Indeed, some open shop plants compete with union plants of the same employer in that they manufacture the same product.

Further, it is not unusual for a utility or manufacturer, for example, to operate union and open shop in the same geographical area. If the employees sharing a community of interest in an appropriate bargaining unit (typically, an individual plant or plants) choose to unionize, the plant is operated on a union basis; if they do not choose unionization, the unit is operated on an open shop basis. Whether the different appropriate units are commonly owned, managed or controlled has no bearing on the matter.

In brief, the National Labor Relations Act does not now - nor has it ever, precluded the simultaneous operation of different entities or establishments union and open shop even though commonly owned or commonly managed or commonly controlled or any combination thereof. HR 281 would change this and impose obligations on employers in the construction field totally different from those heretofore imposed and totally different from those imposed on employers in any other fields. This legislation could prohibit shareholders from investing in both a union and open shop construction company in the same geographic area - the entire U.S.

in the case of national agreement holders. Such an unprecedented restriction on the employment of investment capital in the construction industry represents a reaction which is radical in the extreme.

This legislation is flawed, unfair and singularly inconsistent with the national interest. We urge that Congress reject HR 281 and its substitute amendment as proposed by the House Committee on Labor-Management Relations.

ABC

ASSOCIATION OF BITUMINOUS CONTRACTORS
[illegible]

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STATEMENT OF THE ASSOCIATION OF BITUMINOUS CONTRACTORS, INC. IN OPPOSITION TO S. 492

The Association of Bituminous Contractors, Inc., (ABC) is comprised of construction companies throughout the United States which perform specialized construction on coal mine property as well as more traditional industrial and underground construction off coal lands. ABC members are signatory to collective bargaining agreements with the United Mine Workers of America covering certain coal-related construction on mine property.

There are ABC members which have parent, subsidiary or "sister" companies that perform construction under collective bargaining agreements with other unions, or nonunion. These so-called "double-breasted" operations have been established and maintained for many years, not to avoid obligations under a labor agreement, but to be able to compete for work with nonunion companies, and in the case of some companies, to maintain ties with more than one union in construction.

We oppose S. 492 because it would cause significant and far-reaching problems for our industry. Among other things, the bill would:

1. Disrupt bargaining relationships which have lasted for 15 years and longer. It is wrong to assume that all double breasted employers simply divide their operations between union

and nonunion construction. In certain segments of the collective bargaining industry, such as the coal mine construction industry, it is not uncommon for employers to maintain bargaining relationships with multiple unions through "dual-shop" arrangements. In other words, instead of maintaining a union entity and a nonunion entity, these employers may have two or more unionized companies, as well as a nonunion company, all performing work within the same geographic area, but under different labor arrangements. S. 492 makes no provision for employers which have several union entities in the same geographic area. Which union contract would apply to the employer's next job? Which union contract would apply to an employer's nonunion entity? With which union would an employer be obligated to bargain at the expiration of a contract?

2. Result in a loss of work for unionized companies. Contrary to the suggestion of some, passage of S. 492 will not mean more work for unionized construction workers. Enactment of S. 492 will mean only that companies which are exclusively nonunion (i.e., have no related union company) will capture all of the nonunion work. So called "double-breasted" companies may choose to forego long established union relationships in order to compete for nonunion work.

3. Thrust employers in the middle of jurisdictional disputes between unions. As indicated previously, many employers have collective bargaining agreements with more than one union. Jurisdictional disputes often result in picketing, filing charges with the NLRB, and construction delays.

4. Create confusion and divided loyalties among workers who hold more than one union card or prefer to work nonunion.

5. Create an environment of uncertainty and potential strife in the construction industry. Many employers will bargain to discontinue areawide and nationwide agreements which could be made applicable to their nonunion operations. The result will be more strikes and picketing, and the eventual loss of union jobs.

Proponents of S. 492 argue that a change in the law is necessary to prevent companies from establishing "sham" business entities to avoid their obligations under existing collective bargaining agreements. This is not true.

The National Labor Relations Board has long held that the use of a sham business entity to avoid obligations under a collective bargaining agreement violates the National Labor Relations Act. Principles developed by the Board, such as the alter ego doctrine, are aimed specifically at such practices. Not too long ago, the Court of Appeals for the District of Columbia Circuit affirmed a decision by the Board against a "double-breasted" employer who diverted bargaining unit work to its nonunion firm to avoid its obligation under its union contract. See, Road Sprinkler Fitters, Local Union No. 669 v. NLRB (No. 84-1622 and 85-1002)(D.C. Cir. April 22, 1986).

Further, and significantly, there is no longer any validity to the argument that this legislation is needed to prevent employers from repudiating contracts in the construction industry. The NLRB has now ruled that pre-hire agreements in the construction industry are binding on employers and unions during the term of those agreements. John Deklewa, et al., 282 NLRB No. 184 (Feb. 20, 1987). Thus, under existing law, such agreements are binding and cannot be repudiated.

In reality, S. 492 is an attempt by certain unions to gain and preserve through legislation what they are unable or unwilling to get in the competitive marketplace. Historically, this type of legislative solution for competitive shortcomings has never been, and never will be, successful. S. 492 should not be enacted.

Dated: June 17, 1987

PHCC

National Association of Plumbing-Heating-Cooling Contractors

Pride In Our Past—Faith In Our Future

STATEMENT
TO THE
LABOR SUBCOMMITTEE
COMMITTEE ON LABOR AND HUMAN RESOURCES
UNITED STATES SENATE
ON
S. 492
CONSTRUCTION INDUSTRY LABOR LAW AMENDMENTS

on behalf of the

National Association of Plumbing-Heating-Cooling Contractors

June 4, 1987

180 S. Washington St., P.O. Box 6808, Falls Church, VA 22046-1148 • 703/237-8100

Mr. Chairman,

The National Association of Plumbing-Heating-Cooling Contractors is the oldest national association in the construction industry and the largest plumbing and mechanical subcontractor association. We have more than 6,000 members. The contractors are primarily small businesses who are struggling to make a profit and frequently tread a fine line of profitability. This industry employs over 510,000 people and has receipts of 32 billion dollars.

NAPHCC strongly opposes S.492, a bill that would ban double breasted contracting. The bill would curtail competitiveness and flexibility and it would limit the freedom of investment and ownership, thus, destroying the right to choose business opportunities. Since a large number of construction firms are small business, this would have a disproportionate adverse impact on small business and their employees.

Under existing law, owners of construction firms are permitted to own and operate separate and distinct construction companies with different labor relations policies. Thus, a contractor can own an open shop company that employs nonunion people and a union company that employs union members, subject to the collective bargaining agreement. This dual shop arrangement is legal only if day to day operations, general management, and labor-management relations are kept separate. If the contractor does not properly establish and maintain these separate identities, the law requires that the collective bargaining agreement of the union company would apply to the nonunion company.

In the current construction market, some communities and some jobs will have work done only by union contractors. In other communities or on other jobs, bidders can only be successful if they bid nonunion. On some jobs, the prime contractor may be a union contractor and subcontractors may be nonunion. On still others, just the reverse may be true. Existing labor law permits this while providing a careful balance through the National Labor

Relations Act (NLRA) against abuses.

In fact, from October 1983 through July 1986 there were over 100,000 unfair labor practice charges filed, according to the National Labor Relations Board (NLRB). Of those, only 107 (or one-tenth of one percent) dealt with the conduct which supporters of this legislation want to prevent. These statistics hardly support the contention that there is wide spread abuse.

The legislation would make a significant change in labor law by adding a new definition. It would add to the NLRA a definition for "single employer" as any two or more companies doing "the same or similar work, in the same or different geographical areas" and "having directly or indirectly--substantial common ownership; common management; or common control."

Furthermore, the bill would give pre-hire agreements the full status of a collective bargaining agreement even though the employees have not agreed to such an agreement. However, this has largely been accomplished by the decision of the National Labor Relations Board on February 25, 1987, in the John DeKlewa and Sons case.

"Pre-hire agreements" are unique to the construction industry under the law. They permit contractors and unions to negotiate terms and conditions of employment before the first worker is hired. However, rather than permitting workers to opt into a union through the customary election process, the new decision and this bill force these new employees to accept a union and then attempt to opt out through a decertification process.

This clearly weakens our current labor laws which are intended to protect employees. It limits employee control over their own labor destinies by forcing employees to accept representation by a union even though a majority of employees may not want to be represented by that union or by any union.

As Secretary of Labor William Brock stated in his April 14, 1986, letter to the House of Representatives, "Our labor laws guarantee that the choice of whether to join a union is the employee's, not the employer's and not the union's." He urged the House to reject a similar bill.

In current public policy debate, a great deal of attention is devoted to competitiveness. While promoting competitiveness internationally, it would certainly be counter productive to limit competitiveness domestically, especially among small business. Yet, that is what these bills would clearly do. They would restrict free enterprise by preventing contractors from competing in both of the two sectors of the market, union and nonunion. A contractor would be forced into being one or the other, thus reducing the number of competitors. Decreased competition in either sector will lead to higher prices.

While last year's House debate on this legislation specifically disavows an intent to permit common situs picketing, the language in this bill does not permit us to feel secure. The restrictive nature of the legislation will force construction jobs to be completely union or completely nonunion. Our organization has already begun hearing reports of nonunion contractors avoiding construction projects with union contractors, and union contractors avoiding projects with nonunion contractors. This is in anticipation that S.492 or its companion bill, H.R.281, will pass.

The impact on small business should not be overlooked. Since a great many construction firms are small businesses, this restriction on free enterprise will restructure the competitive marketplace and force many companies out of business. It will severely curtail the profitability of other business. (See Attachment B for currently legitimate activities by small business that will be hurt by S.492). Perhaps that's why the 1986 White House Conference on Small Business included opposition to double breasting legislation among its top 60 recommendations.

In conclusion, NAPHCC places opposition to this as our number one priority. We urge you to do so also. Attached is the association's position paper (Attachment A) on double breasting.

NAPHCC strongly opposes double breasting legislation which restricts competitiveness in the construction industry. It limits the freedom of investment and ownership, and destroys the right to choose business opportunities. It also alters existing labor laws which protect workers' rights to choose whether to join a particular union or any union and weakens their right to control their own economic destiny. Small business construction contractors and our employees are severely impacted by this proposed double breasting legislation.

Thank you for providing this opportunity to share the views of the National Association of Plumbing-Heating-Cooling Contractors.

DL/jat/3087G

ATTACHMENT A

PHCC

National Association of Plumbing-Heating-Cooling Contractors

Pride In Our Past—Faith In Our Future

Position Paper

D7

DOUBLE BREASTING LEGISLATION

NAPHCC POSITION

NAPHCC strongly opposes legislation which would restrict competitiveness in the construction industry by redefining single employer. It would limit the freedom of investment and ownership, destroying the right to choose business opportunities.

BACKGROUND

Legislation under consideration by Congress would redefine single employers and compel management to apply pre-hire agreements to workers. The legislation would prohibit common ownership of two or more enterprises with different labor relations even though the companies are kept completely separate.

1. Restricts free enterprise by preventing the contractor from operating both a union and a nonunion operation.

2. Weakens our current labor laws in the respect of the decisions of individual workers and the assurances of workers to have the control of their own destinies through the collective bargaining process. This would be a significant departure from our current National Labor Relations Act.

3. Limits potential market of both a union and a nonunion contractor. By doing so, it limits job security for both a union worker and a nonunion worker.

4. Broadens the existing pre-hire exemption now found in the National Labor Relations Act.

5. Limits common control which could permit common situs picketing on jobs under common control of a prime contractor. The restrictive nature of the legislation will force contractors and construction jobs to be completely union or completely nonunion regardless of the competitive role in the marketplace or the preferences of workers.

6. Forces pre-hire agreements onto employees which could subject them to union contracts which they have not agreed to.

7. Has potential adverse effect on the effectiveness of the NAPHCC to adequately represent our members due to the great risk of loosing members because of the obvious need on their part to make a decision to choose union or nonunion status of their business.

2991G/DL

180 S. Washington St., P.O. Box 6808, Falls Church, VA 22046-1148 • 703/237-8100

ATTACHMENT B

LEGITIMATE ACTIVITIES OF
SMALL BUSINESS CONTRACTORS
HURT BY S.492

Double breasted firm operating in two markets

Contractor X operates a union contracting business. He performs work for the federal government which requires him to pay Davis-Bacon Act prevailing wages (i.e. union wages). However, he finds that his wage rates and benefit costs are pricing him out of the market to compete against open shop contractors for nongovernment work.

Contractor X establishes a separate contracting firm with separate management and labor relations to operate a nonunion business. The union company competes for work on federal government projects and the nonunion company competes for work on nongovernment projects.

If S.492 passes, Contractor X will close down one of the companies and lay off employees. Either he will conclude that the union contracting business is more profitable and close down the nonunion shop or he will conclude the nonunion business is more profitable and he will close down the union shop. He will not convert the nonunion shop to a union shop, because he will not have the volume to sustain it.

RESULTS: One small business who's out of business.
Employees out of work.

Open shop firm doing some union work

Contractor Y operates an open shop contracting business. From time to time, he gets a small subcontract to work on a union job. Although not signatory to a union agreement, he agrees to pay union scale wages on those jobs.

If S.492 passes, Contractor Y will avoid working on such union jobs for fear of bringing his total operation under the union agreement.

RESULTS: One small business with less business and less employees.
Employees out of work.

DL/jat/3087G

STATEMENT OF JAMES E. ROTH
TO
U.S. SENATE
COMMITTEE ON LABOR AND HUMAN RESOURCES
ON
S. 492, THE CONSTRUCTION LABOR LAW
AMENDMENTS OF 1987
MAY 1987

Mr. Chairman, other members of the Committee, my name is James E. Roth, President of James E. Roth, Inc., Mars, Pennsylvania. I am submitting these remarks as President of the Sheet Metal and Air Conditioning Contractors' National Association, Inc. (SMACNA), representing 5,000 contributing unionized construction companies. I want to express our opposition to S. 492, the Construction Industry Labor Law Amendments of 1987.

While many organizations may oppose this legislation based on animosity toward the union movement or certain construction unions in particular, SMACNA represents a membership of contractors generally enjoying quite positive relations with our union counterpart, the Sheet Metal Workers International Association, (SMWIA). We believe that a coercive new law which complicates labor-management negotiations and relations is not required or conducive to improved labor-management harmony.

A major flaw with the legislation, from our analysis, is the overly restrictive effect it would have on corporate organization and investments. Further, it would restrict the legal right of union contractors or their relatives to have ownership in two or more independent companies performing similar but not sheet metal work in the construction industry. This is due to the fact that the definition of a dual shop enterprise is too loosely constructed. For example, all that would be required to bring two construction firms under the same collective bargaining agreement is direct or indirect ownership, management, or control. Two firms performing "similar" work in different geographic regions would trigger "single employer status" even if the business connection is an entity 1,000 miles away with no shared day-to-day management operations. This broad language may even adversely impact foreign operations in addition to domestic construction if the enterprise is party to a national standard form of agreement.

Current labor law obviates the need for this type of legislation. Where the union and open shop companies of a dual shop operation have interrelation of operations, centralized control of labor relations, and common management, the National Labor Relations Board has consistently found that the open shop division is subject to the collective bargaining agreement.

Another area addressed by S. 492 is that of pre-hire agreements. We feel strongly that labor agreements are binding on both parties and that a pre-hire agreement, to be binding on the contractor, involves an obligation on the part of the Union to provide qualified workmen in sufficient numbers to enable a contractor to perform his work in a timely manner. SMACNA and our union counterpart have addressed this problem and have agreed not to repudiate pre-hire agreements during their term. This has resolved the issue of management honoring pre-hire agreements and the Union supplying the skilled workmen necessary for the unionized sheet metal industry.

In conclusion, SMACNA contractors realize that the ability to create jobs in our industry is directly related to their ability to be productive, competitive, and win contracts. Our industry clearly demonstrates that unions willing to work with management in negotiating competitve collective bargaining agreements do not need and will not benefit from legislation such as the Construction Industry Labor Law Amendments of 1987.

Thank you for your consideration of this issue of critical importance to the unionized construction industry.

TESTIMONY

to the

LABOR SUBCOMMITTEE

of the

LABOR AND HUMAN RESOURCES COMMITTEE

of the

UNITED STATES SENATE

Concerning

S. 492

"Construction Industry Labor Law Amendments of 1987"

BY

WILLIAM E. POTTER

Chairman, President and Chief Executive Officer

PRESTON CORPORATION

151 Easton Boulevard

Preston, Maryland 21655

Telephone: 301-673-7151

ON

Thursday, June 4, 1987

WHY PRESTON CORPORATION OPPOSES S. 492

"Construction Industry Labor Law Amendments of 1987"

Introduction

Preston Corporation, a holding company, consists of the following wholly owned subsidiaries: Bowie Hall Trucking Company; Pioneer Transportation Company, Inc.; Preston Trucking Company, Inc.; Reeves Transportation Company; Saia Motor Freight Line, Inc.; and Smalley Transportation Company which are union and nonunion motor common carriers of general commodities. Our subsidiary, Reeves Transportation Company's President, Mr. Arvis T. Harris, was recently requested by U. S. Representative, Ed Jenkins, who represents the Congressional District in which Reeves' corporate headquarters is located, to present a written explanation as to why Reeves, a non-construction company, is opposed to H.R. 281, "Construction Industry Labor Law Amendments of 1987." Subsequent to the fulfillment of this request, Representative Jenkins inserted this statement of explanation in the April 22, 1987 Congressional Record (Vol. 133, page E1475).

In response to Chairman Metzenbaum's suggestion that we submit written testimony with regard to S. 492 "Construction Industry Labor Law Amendments of 1987," we are submitting the text of the above-described statement regarding H.R. 281 as it is still appropriate, applicable, and timely to S. 492.

Our opposition can best be summarized by simply stating that passage of either S. 492 or H.R. 281 would establish a bad precedent for American business. We recognize that this simple summary statement raises many questions. What follows is the answer to those questions.

The Complaint

The double-breasting bill was introduced in the 99th Congress where it passed the House and failed to come before the Senate. During the 99th Congress the unions published a pamphlet explaining their complaint. In one section of the pamphlet there is the following:

> "Specific construction industry provisions of the federal labor law intended to assure protection of (collective bargaining) rights are being ignored through erroneous decisions of the National Labor Relations Board.
>
> As a result, contractors today freely ignore pre-hire agreements. And sham double-breasted operations -- the practice of a union firm setting up a separate nonunion operations to avoid its collective bargaining obligations -- are multiplying."

In other words, there are two parts to the complaint: pre-hire agreements are ignored and sham double-breasting operations exist.

What Is a Pre-Hire Agreement?

Prior to the enactment of the Landrum-Griffin Act in 1959, no employer could enter into an agreement with a union without its employees first designating the union as its representative. The Landrum-Griffin Act made an exception to that rule for the construction industry only. The exception, known as the pre-hire agreement, arises where a contractor and a construction union reach an agreement on the wages, hours, and working conditions before any employees are hired, and before a union election.

A pre-hire agreement is a voluntary arrangement permitted by Congress. Because the union does not have majority status at the time these agreements are entered into, such agreements do not give rise to a presumption of majority status either during the term of the agreement or after its expiration. Accordingly, the employees subject to these agreements are entitled to a Board-conducted election at any time and the contractor is not obligated to negotiate subsequent pre-hire agreements. By contrast, since union contracts in other industries are with majority representatives, such contracts preclude elections during their term and the employer is obligated to negotiate for subsequent contracts. This is because a majority representative has a presumption of continued majority status after its contract expires. Of course, if during the term of a pre-hire agreement a union demonstrates that it represents a majority of the contractor's employees, it becomes the majority representative and is entitled to the presumption of continued majority status.

In 1971 the National Labor Relations Board ruled that pre-hire agreements could be unilaterally repudiated by an employer without committing a refusal-to-bargain violation under the National Labor Relations Act. R. J. Smith Construction Co., 191 NLRB No. 693. As will be seen below, that decision was overruled by John Deklewa & Sons, 282 NLRB No. 184, February 20, 1987.

What is a Double-Breasting Operation?

A holding company which owns two or more subsidiaries, one of which is union and the other nonunion, is considered to be a double-breasted operation. The holding company has a union side and a nonunion side. It is important to note that there is nothing morally or legally wrong with a double-breasted operation. In the trucking and construction industries it is fairly common among the larger enterprises for them to own both union and nonunion companies. This allows the businesses involved to be competitive in two markets -- union and nonunion. Buying an old, existing company or creating a new company to compete in different market areas makes sound economic and business sense.

What Is a Sham Double-Breasting Operation?

It appears that in the construction industry some union companies have been known to repudiate their voluntary pre-hire agreements and the nonunion side of their business moved in to take the job. The characteristics of the sham operation frequently are:

1. The same individuals are operating both companies on a day-to-day basis, and

2. The two companies exchange equipment, supervision, and employees.

It is obvious that a sham operation does not include the situation where a union side operates in one part of the country and the nonunion side in another part. For practical purposes, then, it appears that sham double-breasting operations are essentially (perhaps not legally) tied in with a repudiated pre-hire agreement in a local area.

The Proposed Solution

In 1987 a House bill (H.R. 281) and a nearly identical Senate version (S. 492) were introduced to address these issues. H.R. 281 has since gone to a sub-committee hearing on March 4, 1987, and a sub-committee mark-up on March 31, 1987. Nothing has happened to S. 492 yet.

Section 2(a) of H.R. 281, as marked-up, provides as follows:

> "Section 2(2) of the National Labor Relations Act (29 U.S.C. Sec. 152(2)) is amended by adding at the end thereof the following new sentence: 'Any two or more business entities engaged primarily in the building and construction industry, performing work within the geographical area covered by a collective bargaining agreement to which any of the entities is a party, performing the type of work described in such agreement, and having, directly or indirectly --
>
> '(1) substantial common ownership
> '(2) substantial common management; or
> '(3) substantial common control;
>
> shall be deemed a single employer: Provided, that the existence of a contractor/sub-contractor relationship between any two or more business entities working at a construction site shall not, by itself, be deemed to create a single employer or be considered as evidence of direct or indirect common management or control, within the meaning of this sentence.'"

Section 2(b) of the bill then applies the collective bargaining agreement of the union side to the open-shop side of the newly defined "single employer" entity.

Those two sections attempt to take care of the perceived double-breasting situation. The remaining substantive section of the bill deals primarily with the pre-hire agreement.

The Intervening Event

After the identical bills were introduced in the House and Senate, the National Labor Relations Board rendered a decision (February 20, 1987) which affects the situation to a large extent. The decision (Deklewa, which was cited above) holds that construction industry employers cannot unilaterally repudiate a pre-hire agreement. This decision has made pre-hire agreements binding, hence, the complaint of the union about "erroneous decisions of the National Labor Relations Board" has been resolved.

Illegitimate operations in the past may have repudiated pre-hire agrements in order to shift work to open shop sides of their operations. Because of the Deklewa decision, this practice cannot occur, and it will be much more difficult for the sham double-breasting operation to exist. In effect, Deklewa has provided a cure for sham operations as well.

Why a Bill?

In view of the Deklewa decision, why is a bill on this subject necessary?

Answer: There is no legislative reason. However, supporters of the bill have their own reasons and continue to push for its passage. Let us take a look at their concepts.

Concept No. 1 -- Double-Breasting is Wrong Per Se

Supporters of the bill never seem to make a distinction between double-breasted operations and sham double-breasted operations. When Senator Kennedy introduced S. 492 on February 5, 1987, he said:

> "The Construction Industry Labor Law Amendments of 1987 will close the twin legal loopholes in the law by prohibiting double breasting and the repudiation of pre-hire agreements."

This insistence on characterizing all double-breasted operations as bad is carried over into the bill. The obvious result is that many innocent people are punished along with the few guilty ones. Here are two ways the innocent contractors -- those not involved in sham operations -- are victimized:

1. Section 2(a) of the bill, quoted above, establishes a definition for "single employer" in the construction industry. This provision is placed near the beginning of the National Labor Relations Act and affects the entire act. Thus, as a "single employer" the union side on a job in Chicago may be picketed by union pickets in an attempt to force a union contract upon the Texas-based, nonunion side of the holding company.

2. Section 2(b) of the bill refers to an existing collective bargaining agreement. In his written testimony presented to the House

> Subcommittee on Labor-Management Relations, Mr. Robert A. Georgine, President of the AFL-CIO Building and Construction Trades Department, said (March 4, 1987): "Only where an employer has signed a nation-wide agreement would the bill require its application to that employer's double-breasted operations anywhere in the United States." In other words, a perfectly honest nonunion company -- not in any way connected to a sham operation -- located in Texas would become automatically a union company because its union side in New York City is signatory to a national agreement.

It is worth emphasizing that if the bill is enacted into law, both of these situations will cause many nonunion companies to become union shops automatically, without the consent of their employees, on the day of enactment or one year later even though none of the companies involved had ever been a party to a sham operation. Moreover, in both situations, innocent people all over the country may be punished for a problem existing only in one local area.

Concept No. 2 -- Convert Voluntary Pre-Hire Agreements into Compulsory Agreements

As noted above, the union published a pamphlet last year dealing with this subject. Here are a few more sentences from that pamphlet:

> "When Congress passed the Landrum-Griffin Act of 1959, it recognized that the construction industry required special provisions if stable labor relations were to be maintained.
>
> The passage of legislation approving pre-hire agreements was intended to provide workers a means to gain such protection (union representation) in the special circumstances of this unique industry.
>
> The pre-hire agreement has served both workers and employers well over the years."

In addition, Senator Kennedy's remarks (noted above) contain the following:

> "Recent decisions of the National Labor Relations Board have effectively destroyed the construction industry provisions in current law."

In other words, supporters of the legislation explained that the Landrum-Griffin Act of 1959 adjusted labor relations in the construction industry so that it served both workers and employers well over the years. Then, it is asserted, recent decisions of the National Labor Relations Board have effectively destroyed that harmonious balance. Obviously, if conditions were changed once again to bring back the balance that was created by Landrum-Griffin, all would be well. This was the irresistable logic set forth by the supporters on the pre-hire aspect of the problem. The Deklewa decision has restored that balance. However, the supporters of the bill still push for passage.

Why?

As noted above, Mr. Robert Georgine testified for H.R. 281 on March 4, 1987. In response to a question on whether Deklewa has solved their problem on pre-hire agreements, Mr. Georgine stated that Deklewa had not gone far enough. It did not allow the union to continue as the bargaining agent after expiration of the pre-hire agreement, regardless of any showing by the unions that it represented the majority of the workers. Supporters of the legislation now emphasize the importance of this objective which is a great departure from the original objective of returning to the time when -- under the Landrum-Griffin Act -- the pre-hire agreement served "both workers and employers well ...."

This departure is in reality an attempt to amend the National Labor Relations Act. Why is the basic labor-management statute being amended in one direction on one point against the legislative history when there are many other issues equally important, if not more so, which should be addressed in the National Labor Relations Act?

The Precedents

As noted at the outset, the single reason for opposition by non-construction companies could be stated to rest upon the proposition that passage would establish a bad precedent. In view of the discussion above, there are three bad precedents which would be created:

1. A bill would be enacted without legislative reasons to support passage. The pre-hire agreement has been corrected by Deklewa to reflect the intention of the Landrum-Griffin Act. Adequate legal remedies already exist to shut down sham double-breasting operations and the Deklewa decision removes any incentive for companies to engage in such shams.

2. Innocent people are punished along with any remaining guilty ones.

3. The National Labor Relations Act is being opened for amendment on one point only without taking into account the other areas that are in need of legitimate reform.

Any one of these three precedents is bad, but punishing innocent people is particularly obnoxious. Punishment for no cause is not an American tradition and not an activity we Americans believe our legislators should practice. The imminent threat of punishment without cause has united the non-construction industries in the business community to oppose this bill more than any labor-related issue in nine years.

Conclusion

H.R. 281/S. 492 must be defeated.

ASSOCIATED BUILDERS
AND CONTRACTORS, INC.

WRITTEN STATEMENT OF

TED C. KENNEDY, PRESIDENT, BE&K, INC.

REPRESENTING

ASSOCIATED BUILDERS AND CONTRACTORS

HEARING BEFORE THE SUBCOMMITTEE ON LABOR

LABOR AND HUMAN RESOURCES COMMITTEE

UNITED STATES SENATE

ON

S. 492, THE CONSTRUCTION INDUSTRY LABOR LAW AMENDMENTS OF 1987

JUNE 4, 1987

729 15th Street, NW • Washington, DC 20005 • (202) 637-8800

MR. CHAIRMAN:

Associated Builders and Contractors is pleased to have this opportunity to testify in opposition to S. 492, the Construction Industry Labor Law Amendments of 1987, and in favor of free, open and fair competition in the construction industry.

I am Ted Kennedy, President of BE&K, Inc., an engineering and construction firm specializing in process-oriented industrial plants and a member of Associated Builders and Contractors. BE&K, with an annual business volume of almost one billion dollars, operates a merit shop construction firm. Although we operate as an open shop general contractor, BE&K does utilize union subcontractors on a regular basis for over half of the speciality trades required on projects.

I come to you, Mr. Chairman, as a contractor and a businessman who is very concerned about the serious ramifications of S. 492. As an individual who has known the construction business for my entire career, I am deeply disturbed that Congress would consider legislation forcing American companies into unwanted and unnecessary contractual agreements and infringing upon individual freedoms of choice and opportunity.

I am strongly opposed to S. 492 and would like to present my testimony to this committee explaining the many reasons why this legislation would not just be bad for my construction firm -- but for the entire construction industry. This is not a union versus nonunion issue, MR. CHAIRMAN. My message today is that S. 492 affects detrimentally the entire construction industry.

This is a labor-management issue and deserves the balanced concern of all parties. If not, Congress may enact legislation which will hurt American workers and American competitiveness.

Associated Builders and Contractors, ABC, is a national construction trade association representing over 20,000 construction employers, contractors, subcontractors and suppliers. As an active member and a past National President of ABC, I know that ABC is the spokesman for the open shop segment of the construction industry and presents a unified voice opposing S. 492.

MR. CHAIRMAN, ABC believes in the "merit shop" -- a concept which states that all contracts in the construction industry should be awarded on the basis of "merit" in a free and open bid environment. Briefly stated, the merit shop philosophy is the free enterprise system at work on the construction jobsite -- a business climate in which any firm may work with another, regardless of labor affiliations. Further, ABC supports the employee's right to work without compulsory union membership. My message to the committee today is that if S. 492 is enacted, the "merit shop" concept will be nonexistent, eliminated by special interest legislation.

OVERALL IMPACT OF S. 492 ON THE CONSTRUCTION INDUSTRY

Today, 70-75% of all construction work is completed by the open shop segment of the industry. In 1984 construction union membership ranked at 24.8% compared to 34.9% in 1980 and 40% in 1973 (Bureau of Labor Statistics). In fact, in many areas across the Nation this ratio between union and open shop construction is tallied on a 10% to 90% split in favor of open shop. Obviously, the union segment of our industry is responding to this decline in membership by supporting the legislation subject to hearings today, S. 492 -- legislation that would eliminate the ability to own both union and open shop construction companies, eliminate the use of "prehire" agreements in the construction industry, foster the ability of labor unions to shut-down job sites, and promote compulsory unionism.

ABC asks that the members of this committee carefully consider the overall impact of S. 492 prior to voting such a disastrous measure out of committee for Senate action.

S. 492 would destroy the pattern of collective bargaining which has evolved through many years in the construction industry. The bill is a desperate effort by entrenched national labor leaders -- to restore by legislative fiat -- the unwarranted economic power and leverage they have lost in the courts and in the marketplace through years of turning their backs on fair and reasonable negotiations. There are better alternatives to making construction employers and their employees more competitive -- work rule modifications and wage and benefit restraints could lead to increased productivity -- than to pass protectionist legislation. If there has been a gain in the numbers of nonunion employees in the construction industry and a resultant decrease in union membership, then I suggest to the committee today that Congress work with the labor movement to oversee their own work practice rules and inflationary wage scales as the root cause of declining union membership and not besmirch the integrity of the labor laws which are working today by cooperating in such a disruptive and detrimental legislative exercise.

The proponents of this legislation claim that S. 492 would stabilize construction labor relations and that it is needed to prevent [union] contractors from evading their collective bargaining agreements. This is simply not the case. This legislation would, in fact, accomplish just the opposite of what its supporters claim it would do. Enactment of S. 492 would seriously hurt union construction, offer no benefit to union workers, impair the rights of employees in nonunion firms to decide for themselves whether or not they want to join a union and restrict competition in the marketplace.

Enactment of S. 492 would act as a death knell to the now-severely depressed organized sector of the construction industry in many parts of the Nation, destroying both businesses and jobs. It would reinforce the anti-free enterprise, anti-competitive practices engaged in by organized labor in many metropolitan areas. But, even further, this legislation would severely limit the unionized market share in the construction industry.

Citing the above-mentioned statistics indicating increasing markets for open shop construction in the past ten years, I want to make it clear to this committee that many dual-shop operations, commonly referred to as "double-breasted" operations, will decide to close down the now-healthy union shop and to work exclusively as an open shop contractor. Contractors are businessmen, MR. CHAIRMAN — businessmen and women that are faced with current market realities. It must be remembered during today's hearings that it is our construction users and clients which determine if a contract will be let open or closed shop. While I believe that a vast majority of union contractors would prefer to remain union, S. 492 would force many of them to reassess their position and decide to be either all union or all open shop. With open shop construction at 70% or more of the market, contractors might choose to sell or close down their union operations rather than give up open shop opportunities. With the prevalence of work in the "open-shop" segment, S. 492 will simply cut off opportunities for union construction firms.

If S. 492 is aimed at reversing a decline in the collective bargaining system in our country, it misses the mark. If it is an attempt to make the union shop more competitive, it misses the mark. AND if this legislation in an attempt to shut-out fair competition in certain segments of this Nation by eliminating open shop operations and increase union membership and pension funds, then S. 492 definitely misses the mark since in many regions of our Nation it is the open shop that will flourish when dual shop company owners are faced with closing one of the construction arms.

However, the converse is also true in many regions in our Nation. Due to market practices, a contractor may be forced to close the independent open shop arm to keep the union firm in business. This is hardly a fair burden to place on the backs of an industry that provides over $250 billion to the GNP and 17 million construction and industry related jobs.

ABC hopes that the members of this committee will remain vigilant against any and all attempts to bring about enactment of a narrow self-interest bill, that does not offer any solution to the collective bargaining complaints offered by the supporters of the legislation.

S. 492 will radically alter more than twenty years of case precedent developed by the National Labor Relations Board and the federal courts in several hundred decisions whose fairness ought not to be open to question, since a majority of those cases have been decided in favor of union interests under current statutory and interpretive law.

Looking at the reasons behind introduction of this legislation, S. 492 is unnecessary and unwise, and moreover, appears to have as its real objective the undermining -- if not outright emasculation -- of other provisions of the National Labor Relations Act which ban common situs and multi-situs picketing, and which now at least partially preserves for individual construction industry employees the right to choose whether or not they wish to be represented by organized labor on a particular jobsite. By extending enforceable collective bargaining agreements to open shop firms, S. 492 would implicitly extend the right to engage in recognitional or organizational picketing against such firms as well, solely on the basis of the existence of passive partial common ownership between those firms and union companies. S. 492 would mandate these companies as "single employers" and invoke the provisions of the National Labor Relations Act which relate to single employers.

NATIONAL COALITION TO DEFEAT H.R. 281/S. 492

Associated Builders and Contractors is a member of the National Coalition to Defeat H.R. 281/S. 492. This coalition, formed in 1986, has over 150 members, trade associations, business groups, corporations and companies, who collectively understand the adverse impact S. 492 would have on both the union AND the open shop segment of the industry. This coalition includes construction firms and associations, manufacturers and other users or customers of construction services, suppliers and distributors of construction products, and other industries and groups either directly or indirectly affected by the bill or by the precedent its passage would establish. I feel confident in reporting to this committee that the resultant impact of S. 492 will reverberate in each and every congressional district and alter the work practices of most jobsites and related industries in your states. Collectively, this coalition is sending a loud and clear message to the Congress -- one I am pleased to represent -- DO NOT PASS H.R. 281/S. 492.

ANALYSIS OF OPPOSITION TO S. 492

There are several specific areas I wish to discuss today in outlining our collective opposition to S. 492. They are:

- The outright ban on Dual Shops or "Double-Breasted" companies
- The current law procedures and remedies to determine "Single-Employer" Status
- The elimination of Section 8(f) Prehire agreements
- The elimination of Secondary Boycott Protections
- The expansion of "Common Situs" picketing, and
- The promotion of Compulsory Unionism

1. The Ban on Dual Shops or "Double-Breasted" companies

Current Law and Remedies under the National Labor Relations Act

Supporters of S. 492 believe that this legislation is necessitated by the rising number of double-breasted entities - entities that the unions believe are formed for the sole purpose of evasion of collective bargaining agreements and obligations. I have heard, over and over again, Mr. Chairman, that double-breasted operations exist to transfer work ordinarily performed by the union arm to the nonunion arm as well as transfer employees. I strongly object to this generalization.

The existence of double-breasted companies has evolved over the past twenty years as the construction market has divided itself into two separate entities — the union and open shop markets. Construction companies which operate in one market are, for all practical purposes, foreclosed from competing in the other market. In order to compete in both markets, many union contractors have created or affiliated with open shop companies (and vice versa), and each is operated on a separate basis. These operations are legal under current labor law. Current law also PROHIBITS the formation of "sham" nonunion companies for the purpose of avoiding unionization or collective bargaining agreements.

Under current law the National Labor Relations Board considers four factors in determining whether or not two employers constitute a "single employer" under the NLRA:

1. interrelation of operations
2. common management
3. centralized control of labor relations, and
4. common ownership

None of these factors is controlling, nor do all need to be present to constitute a "single employer" definition.

Under the "single employer" doctrine, the Board and the federal courts have consistently found that two commonly owned and commonly managed companies that function together with common labor relations policies constitute one, single employer so that the labor agreement at one may cover the employees of the other. Under the NLRB's "alter ego" doctrine, when the owners of a union company form another business entity to which they transfer portions of their business and customers in an effort to avoid existing union contracts, the Board and the federal courts have applied the terms of the labor contract to both entities or have held both companies to be liable for their respective unfair labor practices. The labor laws applied to "single employer" and alter ego situations have been consistently interpreted and enforced by the National Labor Relations Board and the federal courts for over 20 years through both Republican and Democrat administrations.

In cases where the Board has found unlawful "single employer" or alter ego operations used to evade collective bargaining agreements, it has, for example, ordered the "sham" contractor to recognize and bargain with the union, to abide by the terms of the existing contract and to apply retroactively its terms and conditions and to make whole (including backpay) any affected employees, to hold each firm liable for the unfair labor practices of the other, and to make retroactive contributions to the unions' pension, and health and welfare funds.

The current law works, MR. CHAIRMAN and is being upheld.

An analysis of a recent NLRB-conducted survey of its regional offices, covering the period from October 1983 through July 1986, shows that on the average unions have filed fewer than two charges per state, per year involving alleged double-breasting abuses. In over half the states, there were no charges filed against employers alleging that a nonunion company had been formed to facilitate the transfer of work ordinarily performed by the union company. In fact, of the over 100,000 unfair labor practice charges filed with the NLRB during this period, only 103 (1/10th of one percent) allege the conduct which proponents of S. 492 claim it is tailored to prevent. These statistics hardly support the contention that there is widespread abuse by double-breasted enterprises.

In fact, Mr. Chairman, the existence of the double-breasted companies did not come about as a means to transfer either work or employees — it is a practice which has evolved as a result of economic market conditions. Any contractor setting up a "sham" operation is acting illegally and the National Labor Relations Board is not only prepared, but does act on these cases. Fortunately, they are very few in number. Yet, the NLRB's handling of double-breasted cases compares favorably with its handling of its other cases and these cases are handled expeditiously.

Contrary to our opponents' claim that the NLRB will NOT find violations under current law, the NLRB is actually more apt to find merit in charges alleging a single employer issue than it is in other cases. I have attached data describing these NLRB statistics nationwide. The State of Missouri, MR. CHAIRMAN, is served by NLRB Regions 14 and 17, both of which serve other states as well. For the above mentioned survey period — a three year period — eight double-breasting violation charges were filed against employers in Missouri. All of these charges are closed and only one, MR. CHAIRMAN, required the issuance of a complaint.

In seven instances, the union alleged that the employer set up a nonunion company and unlawfully transferred work ordinarily performed by the union company to the nonunion company. Of these, one charge was closed upon compliance with an NLRB Decision and Order, two charges were dismissed by the Board as lacking merit, and the remained were voluntarily withdrawn by the charging parties. The final charge arising in Missouri included the foregoing allegation as well as assertions that the employer refused to recognize and bargain with the union and honor contractual obligations and that it denied the union's request for information relative to other operations of the employer. The parties informally settled this charge without the need for Board intervention.

These most recent NLRB statistics show that the occurrence of problems related to double-breasted enterprises is infrequent in Missouri. Where a charge has been found to have merit, the Board has issued a complaint or the parties have settled the dispute outright. Contrary to the allegations made by proponents of S. 492, the objective evidence on double-breasting charges in Missouri, as well as on charges around the nation, demonstrates that no persistent abuse exists and that existing administrative procedures and remedies are adequate.

We have heard complaints of the length of time it takes the Board to process alter ego complaints. First, I find the evidence contrary to this claim. However, were it a problem, I believe that it could be a serious one in the construction industry as lengths of contracts range from a few months to several years — in essence a contract could be completed prior to Board action. Yet, S. 492 does nothing to remedy this alleged problem and offers no solution to the "delay" concerns. Instead of proposing legislation to stiffen penalties or expedite case decisions, S. 492 goes for the "overkill" -- to eliminate the legal practice of double-breasting for many legitimate contractors to penalize the few illegal operations.

SINGLE EMPLOYER STATUS

S. 492 proposes dramatic changes in the current law test to determine "single employer" status. As I stated earlier, the current law involves weighing four factors of common ownership, centralized control of labor relations, common management and common control to determine whether the employers in question constitute two separate employers or a single integrated enterprise. These factors are currently considered in the aggregate. They need not all be present, and no particular factor is controlling. S. 492 would change this by finding "single employer" status if any of three factors were present -- common ownership, management or control. This test would not take into consideration the fact that these companies would be entirely independent entities, independently operated and managed. Further, the word "control" bears a severe impact on relationships in the construction industry between general contractors and subcontractors.

Thus, the new definition for "single employer" would virtually ban all double-breasted operations. This would change the employment status of thousands of workers in the construction industry.

But the legislation goes even further than that with the changing of the "single employer" definition. By not having to show that the two companies had common ownership, control AND management, companies with separate management in a general/subcontracting relationship would have "common" control, thus they would be swept in under the new single employer definition.

In my case, this is a startling change. I am not a double-breasted contractor. My firm is an open-shop general contracting firm. However, on any given day, I subcontract work to hundreds of union subcontractors and exercise a degree of "common control" over those subs. By virtue of the definition of S. 492, my subcontractors and I would be considered a single employer for the purposes of the National Labor Relations Act.

While the bill states that firms must be engaged in the "same or similar work," proponents interpret this language to mean that an electrical contractor would not be treated as a single employer with a plumbing contractor because they are not performing the same craft, this is a very major assumption. In fact, the bill does not state similar "crafts" which has a particular meaning in the construction industry. Instead, S. 492 uses the broader standard of "same or similar work."

If one looks at the interpretation of projects under the Davis-Bacon Act, this clarification becomes even more critical. The Davis-Bacon statute provides that wages should be determined based on "projects of a character similar to the contract work" which has been interpreted to refer to projects instead of crafts. This is consistent with the practice in the construction industry, which is normally categorized into four separate areas: commercial building, heavy industrial, highway, and residential. In other words, two entities would be considered to be performing "similar work" as long as they were engaged in commercial building construction work as opposed to residential construction work. It is apparent then, that in interpreting the language of S. 492, defining the term "same or similar work" along narrow craft lines would address construction realities. Unfortunately, this is not the case in the legislation under consideration today. The "same or similar work" definition would bring in contractors, general and subcontractors, union and nonunion as single employers.

Further complicating the definition problem is the historic definition of construction used in other labor laws (Occupational Safety and Health Act and the Mine Safety and Health Act) which says "construction work means work for construction, alteration, and/or repair, including painting and decorating." By consideration as a single employer with my subcontractors, I will be forced by the terms of S. 492 to be signatory to the collective bargaining agreement of one of my subcontractors. Not only will this have the impact of compulsory unionism, strike lock-outs, etc. which I will discuss at length later in my testimony, but it will force many of the craftsmen in my company and in my open shop subcontractors' companies to be under the collective bargaining agreement of the one union subcontractor which would probably have an entirely different trade agreement.

Further, MR. Chairman, I am concerned for what S. 492 will mean to many of my employees who have been working for my firm for years. As master craftsmen and women, they have learned their trade and perform quality and superior work. However, despite their years of experience and training in nonunion apprenticeship programs, if brought under an existing collective bargaining agreement of one of my subcontractors, they will be denied work.

Why? Because it is general practice today in all collective bargaining agreements that there is a "union-only hiring hall referral provision." My employees will be forced to be referred through the hiring hall. But not having graduated from the union apprentice programs, they will not achieve the journeyman status they are now afforded, be forced to collect wages far below their current wage and stand the chance of being discriminated against by the referral hall as not having completed the "proper" apprentice training program. I hope the committee will not take this point lightly. S. 492 will have a serious impact on the current open shop workforce, if a contractor opts to become signatory to a collective bargaining agreement by either subcontracting work to a union sub or doing subcontracting work for a union general. If the contractor does not wish to be forced into these agreements, S. 492 will have a serious impact on the current union workforce, as that contractor will seek only nonunion subcontractors or generals to participate on a jobsite, thus denying millions of jobs to union workers.

Mixed jobsites are not unique in the construction industry. In fact, in practice, the opposite is true. Most jobsites in our country share work between union and nonunion contractors. In my case, I am an open shop general contractor and sub work to both open and union subcontractors. Many union general contractors routinely sub work to open shop contractors with whom they have a good relationship and respect the work completed by that subcontractor.

S. 492, triggering the definition of "single-employer" to all contractors on the jobsite will virtually eliminate any mixing of union and open shop contractors on the jobsite.

Perhaps this is the goal of the legislation, intending to create more opportunities for union contractors. Unfortunately, the legislation will, in reality, deny many work opportunities now available for union construction firms, creating a greater rift between these two segments of the construction industry.

And again, the Merit Shop philosophy of allowing two companies regardless of affiliation to work side by side would be dead.

In conclusion, the new definition of "single employer" in S. 492 would make dramatic changes in the construction industry. It would eliminate all legitimate dual shop firms and would create havoc in the subcontracting practices widely utilized today. Current law penalizes the small number of illegal operations and provides for a harmonious blend of union and nonunion construction firms on many jobsites across America. This will drastically change if S. 492 becomes law.

2. Eliminate Section 8(f) — Prehire Agreements

Federal law currently permits an employer and a union to enter into conditional "prehire" agreements, unique to the construction industry, governing the terms and conditions of employment, before the first worker is hired. The bill, S. 492, would transform those "conditional" agreements into full-blown collective bargaining contracts. Rather than permitting workers to "opt in" to a union through prior validation of the prehire agreements, the bill would force them to first accept a union and then attempt to "opt out" through the cumbersome decertification process.

In enacting Section 8(f) of the National Labor Relations Act (NLRA) in 1959, Congress recognized the unique characteristics of the construction industry and saw that it needed a different set of labor laws to govern it than those applying to non-construction employers. Section 8(f) was an attempt to harmonize the organizational interest of construction unions to gain recognition as a bargaining representative of construction employees, with the right of employees to bargain collectively with representatives of their own choosing.

Construction unions today are principally upset with the U.S. Supreme Court's decision in NLRB v. Local 103, Ironworkers, (Higdon Construction Company).

In the case, the Supreme Court upheld an NLRB order declaring that the Ironworkers had violated the NLRA by picketing for an unreasonable length of time to enforce a voidable prehire agreement without ever gaining support of a majority of the employees in the bargaining unit. As stated by the Higdon Court, "Congressional concern about coerced designations of bargaining agents did not evaporate as the focus turned to the construction industry. Section 8(f) was, of course, motivated by an awareness of the unique situation in that industry."

In upholding the NLRB ruling that unions must have the support of a majority of the eligible employees in a bargaining unit before a prehire agreement will be enforceable, the Higdon decision stated that: "The Board's position is rooted in the generally prevailing statutory policy that a union should not purport to act as the collective bargaining agent for all unit employees, and may not be recognized as such, unless it is the voice of the majority of the employees in the unit."

"Section 7 of the Act guarantees employees the right to bargain collectively with representatives of their own choosing. Section 9(a) provides that the bargaining agent for the employees in the appropriate unit must be the representative designated or selected for the purposes of construction by the majority of the employees..."

The Court said that: "There could be no clearer abridgement of Section 7 of the Act, assuring employees the right to bargain collectively through representatives of their own choosing or to refrain from such activity than to grant exclusive bargaining status to an agency selected by a minority of its employees, thereby impressing that agent upon the nonconsenting majority."

The Higdon case then went on to explain correctly that: "Section 8(f) is an exception to this rule. The execution of an agreement with a minority union, an act normally an unfair practice by both employer and union, is legitimate by Section 8(f) when the employer is in the construction industry."

"The exception is nevertheless of limited scope, for the usual rule protecting the union from inquiry into this majority status during the terms of the collective bargaining contract does not apply to prehire agreements;" and that "the employer's duty to bargain and honor the prehire agreement is contingent upon the union attaining majority support at the various construction sites."

ABC agrees with the U.S. Supreme Court that this is an accurate interpretation of Congressional intent in enacting Section 8(f) in 1959, and that the basic premise underlying the National Labor Relations Act is that employees should be free to choose their own bargaining representatives.

It is hard to imagine how the building trades unions can seriously lobby Congress to eliminate the protections afforded employees by Section 8(f) in order to pursue their own narrow self-interests.

In addition to being fee of the normal legal restrictions of having to gain majority employee support before entering a labor agreement, Section 8(f) also allows unions and employers to include "union security clauses" in their prehire agreement which makes union membership mandatory for an employee within seven days of being hired.

Thus, a union can ensure majority status and the enforceability of a prehire agreement by merely policing the union security clause. In fact, the union business agent is not always anxious to gain majority status as bargaining representative by signing up open shop workers as union members.

This will only increase the number of workers who are eligible to be referred out of the hiring hall, which can in turn reduce the amount of work available to regular union members!

Rather, the business agent, in many instances, will allow the open shop contractor working under a prehire agreement to maintain his open shop workforce. What the business agent is really looking for in this situation is NOT new members but the maintenance of union wages and standards and employer contributions to the union's pension and health and welfare funds.

Significantly, the Supreme Court decided in the Todd v. McNeff case that union pension trustees can enforce minority prehire agreements for past-due fringe benefit payments up until the time the employer repudiates it.
The construction unions have also expressed their desire to see minority prehire agreements be ruled enforceable regardless of the employer's repudiation of the agreement and in spite of the lack of demonstrated interest by the union in having the employer's employees as members.

During the past year, the National Labor Relations Board has undertaken major review of the entire Section 8(f) prehire status. In a momentous decision just last week, the Board determined -- for the unions -- that prehire agreements CANNOT be repudiated during its duration.

Let me take a moment, MR. CHAIRMAN, to discuss the significance of this decision.

After a lengthy review of the prehire cases before the Board, in a 6-0 decision this "Reagan, conservative" Board determined that the union pleas to eliminate repudiation during a project were valid. Throughout the halls of Congress during the 99th Congress and through the first few months of this Congress, offices have heard our opposition state that prehire agreements must have the force of full blown collective bargaining agreements since nonunion contractors are entering into these agreements and then repudiating them just a few short months into the project, in an attempt -- back out of payment into the various union pension and welfare funds.

First, in my lengthy career in the construction industry I can tell you the majority of open shop contractors are legitimate contractors who would not back out of agreements once entered into. Further, it serves the contractor no good to attempt to terminate the agreement as he will be forced off the jobsite in a matter of days. If the open shop contractor entered into the prehire agreement in the first place it is his intention to utilize local hiring halls, to accommodate union work practices on the job site, etc. in order to do this project. His aim is to complete a contract. The contractor in the majority of cases, will not repudiate an agreement and jeopardize losing that contract.

Second, the Board has determined as part of current law today that it is illegal to repudiate this agreement before its natural termination. Therefore, it is not a recommended practice and it can force penalties if attempted. We testified against the prohibition of being able to repudiate during a project, as there are many other circumstances surrounding these agreements under which a contractor may need to be relieved. We are disappointed in the Board's decision. However, the fact is the Board, which has been so harshly criticized by the supporters of S. 492, has upheld their concerns through interpretation of current law.

However, the Board's decision goes further. It cited the need for Section 8(f) prehire agreements in a transient construction industry and allows contractors to repudiate these agreements AFTER the completion of the project. In agreements that have evergreen clauses, automatic renewals, etc., it is the responsibility of the employer to notify that he wants out to cease the agreement.

Under the forces of S. 492, once a "prehire agreement" is signed (and I use that phrase loosely as "prehire" agreements will no longer be a reality) the contractor must undergo the lengthy decertification process to end the agreements after completion of the project. The Board voted this as not being necessary in our industry. S. 492 is an overkill measure that will jeopardize the unique configuration of union and open shop companies working side by side as they have done even more prevalently during the past decade.

The Supreme Court made it clear in NLRB v Local 103, International Association of Bridge Workers, 434 U.S. 335 (1978), that prehire agreements are voidable until and unless the union actually attains majority support in the relevant bargaining unit. The NLRB last week determined that they are not voidable until their end. However, once a union successfully demonstrates majority support, the prehire agreement becomes a Section 9(a) mature collective bargaining agreement. Consequently, if the employer subsequently changes the terms and conditions of employment without bargaining with the union, it violates the National Labor Relations Act.

S. 492, and its House counterpart, would overturn the existing standard and award the union majority status once the agreement is signed, even if the signing occurs before any hiring has actually begun. If the workers actually hired do not want to be represented by a union or want a different union to serve as their bargaining representative, they would be forced to go through the Board's decertification process. In most instances, the construction project would be completed BEFORE the decertification procedures were completed.

Further, by allowing a union to become the equivalent of a certified representative without a vote or validation by employees, and by limiting the methods which employees could rid themselves of an unwanted union, the proposed language would significantly reduce and perhaps even eliminate the freedom of choice construction workers currently enjoy under the law. Even the Congressional Research Study report concedes this point. (CRS study, page 22).

Perhaps the most basic of all rights afforded working men and women under our labor laws is the right to choose whether to have a bargaining agent and who that agent will be. Despite the universal acceptance of this right, S. 492 would automatically place the employees under a union's collective bargaining agreement without a vote or election!

S. 492 PROMOTES COMPULSORY UNIONISM

Since collective bargaining agreements would be automatically applied by operation of law under S. 492 to open shop operations, the bill would eliminate the open shop construction worker's freedom to choose whether to be represented by a union and by which union. The result is compulsory unionism. Even in right-to-work states, those collective bargaining agreements could force a open shop construction worker to seek job referrals through a union hiring hall. And again, I cite the earlier example of the loss of job status, decrease in wages and discrimination in the referral process if this occurs. That simply is not fair to millions of working men and women in the open shop segment of the construction industry.

I wish to bring up the concerns of many legislators with the impact of this legislation -- the compulsory unionism associated with the language in S. 492 Unions and contractors often negotiate "prehire" agreements in the construction industry setting the terms of employment before any workers are hired. Present law protects employees from union attempts to enforce these agreements (for example, by picketing or striking) until the union demonstrates that a majority of workers at a jobsite want to become union members. S. 492 would eliminate that protection. Prehire agreements would be enforced even if none of the employees wanted to be represented by a union. Further, employees can only reject the union (not elected by them in the first place) by using the NLRB's decertification procedures. Under most circumstances, by the time the process is completed, the construction project will have ended and the employees have moved on to other jobs.

In many of our states with bonafide Right-to-Work statutes, this provision is repulsive and has previously been rejected by the voters.

S. 492 WOULD PERMIT COMMON SITUS PICKETING

One of the most hotly contested aspects of S. 492 that has polarized the business and union groups on this issue is the allowance of common situs picketing under the language of S. 492.

I firmly believe that under this legislation, employees would be permitted to picket not only their own employer in the event of a labor dispute, but also any other employer doing business on the jobsite (common situs picketing) or on another jobsite (multi-situs picketing), increasing costs and lowering productivity. The bill's broad definition of a "single employer" (those which have any common ownership, management OR control) would put in place the concepts of common situs picketing.

It is true, that no section of S. 492 calls for a change in current law to permit common situs picketing. Rather, what S. 492 does is change the definition of "single employer," the criteria used in the National Labor Relations Act to determine legal picketing. By expanding the definition, the bill allows a construction union to picket a business entity sharing any direct or indirect common control on a construction site with the contractor subject to the primary dispute. Thus, the control typically exerted by general contractors, like myself, or contract managers (including manufacturers serving in such capacities) could impose "single employer" status on subcontractors on any construction site, and thus, enmesh once-neutral employers in each other's labor disputes — a form of "common situs" picketing. Also, because single employer picketing is lawful where ever the single employer is doing business, those formerly separate contractors would be subject to "multi-situs" picketing.

Under current law, contractors are allowed to have separate gates for each subcontractor on a construction site. This "dual gate" system was designed exclusively to permit work to continue when one employer is involved in a labor dispute. If a union strikes the electrical subcontractor, its picketing is limited to the electrical subcontractor's gate — it cannot, for example, put a picket line in front of the plumbing subcontractor's gate. The construction unions have sought to eliminate this right for years, to allow one union to shut down the entire construction site, but have been unsuccessful in gaining legislative approval of this concept. Many of us remember all too well the common situs and labor law reform battles of the 1970s.

MR. CHAIRMAN, I submit that these battles have returned to the Congress, albeit disguised as H.R. 281/S. 492, but returned nonetheless. S. 492 would create the statutory framework for legal secondary boycotts. Because of the impreciseness of the bill's language in the House and Senate versions, it is conceivable that a general contractor would have sufficient direct or indirect control over subcontractors on the jobsite to make the general and subcontractors a "single" employer. This would enable a union to engage in common situs picketing if it had a dispute with any one of the individual employer entities present on the site. It is this common situs picketing threat that has many in the construction industry up in arms. This is because the common situs picketing aspects of this proposed legislation would affect not only dual shop employers, but also pure open shop contractors working on mixed jobsites under the direction of a general contractor. The reserve gate system successfully used in the past by open shop contractors to restrict the picketing of the union to the disputed contractor's gate would also be made a nullity by this legislation.

I seriously doubt that Congress wishes this to occur.

However, I must bring to the committee's attention the fact that S. 492, introduced in the 100th Congress, is IDENTICAL to the House-passed version in the 99th Congress. Despite repeated expressed concerns of House and Senate membership as to the involvement of common situs picketing in the legislation, the proponents of the bill did not change the wordage to make it explicit that this all-encompassing picketing was not permitted.

UNION VIOLENCE RESOLUTION EMBODIED IN S. 492

Separate legislation has been introduced annually in the Congress to make labor violence a federal offense. Unfortunately, the building trade unions and the AFL-CIO has repeatedly lobbied heavily against this legislation -- preventing its passage in the Senate and even consideration in the House of Representatives. Despite hearings held by the Senate during the last Congress which exemplified a distressingly large number of examples of violent labor disputes, and indications that such incidences are continuing, Congress failed to enact a Hobbs Act amendment making this labor violence a federal criminal act.

I suggest that the Chairman eliminate this provision from S. 492, which is unrelated legislation. I would further suggest that hearings be held in conjunction with the House Judiciary Committee on the current impact of labor violence throughout the United States and its territories, such as Puerto Rico, and the need for effective, enforcement legislation amending the Hobbs Act exemptions.

CONCLUSION

S. 492 is ill-conceived legislation. I come before this committee finding no merit to the proposals contained in this bill. On the contrary, I implore the committee to determine the full impact such legislation would have on the construction industry in general — both on union and open shop employers and union and open shop employees — prior to any committee action.

Labor's solution to declining union membership is to impose, by law, union dues and working conditions on construction workers who have elected to work open shop. Further it would provide the building trades unions unprecedented power to shut down construction sites until labor demands are met.

At a time when the United States is critically concerned with our competitiveness as a major power — legislation like S. 492 is counterproductive. It will not make American companies, union and open shop alike, more competitive, it will not open up greater markets for a specialized segment of the industry. Instead, by ignoring those items which need to be considered to make our industry more competitive — wage rates and work practices — S. 492 imposes an additional yoke burdening the construction industry from competing in an open and free market system. By denying the business community the ability to respond to the marketplace, Congress will impair the construction industry's ability to promote cost-effective quality construction. I am proud of our industry and our ability to meet market demands. I believe there is a place for the "merit philosophy" in our industry and I strongly advise Congress not to pass any anti-competitive proposal that will hurt American business and American workers. There is room in the construction industry for all who wish to participate. Let's not close the door on the very principle which has made us a strong competitive nation — the principle of free enterprise.

Testimony

of the

Associated General Contractors of America

to the

Labor Subcommittee

of the

Senate Labor and Human Resources Committee

June 4, 1987

on

S. 492 - The Construction Industry Labor Law Amendments of 1987

AGC is:

- More than 32,000 firms including 8,000 of America's leading general contracting firms responsible for the employment of 3,400,000-plus employees:
- 106 chapters nationwide;
- More than 80% of America's contract construction of commerical buildings, highways, industrial and municipal-utility facilities; and
- Over $100 billion of construction value annually.

AGC Testimony on S. 492

My name is Robert B. Fay. My firm, the Joseph B. Fay Company, is a building and heavy construction company which employs members of several building and construction trades unions. I am here today representing the Associated General Contractors of America. I am accompanied by Philip Miscimarra, an attorney with the firm of Murphy, Smith & Polk which prepared the attached legal analysis on S. 2181, a bill similar to S. 492 which was rejected by the Senate in the 99th Congress.

The Associated General Contractors of America represents more than 32,000 firms including 8,000 of America's leading general contracting firms responsible for the employment of over 3.4 million employees. AGC members, both union and open shop contractors, perform more than 80% of America's contract construction of commercial buildings, highways, industrial and municipal-utility facilities.

The objective of S. 492, the Construction Labor Law Amendments of 1987, is to prevent further erosion in unions' share of the construction market by locking employers into a collective bargaining relationship and extending that relationship to independent business entities. However, the troubled state of union construction is not going to be cured by a quick fix, especially one that attempts to force rather than to attract an employer into a relationship.

Further, we have repeatedly said that the owner decides when and how a construction project will be built. That decision, and the processes leading up to it, was addressed by Richard E. Heckert, Chief Executive Officer of E.I. Dupont de Nemours and Co. during his presentation to the House Subcommittee on Labor-Management Relations during recent hearings on H.R. 281.

Market Place Realities

S. 492 seeks to reverse the following realities of the construction industry marketplace:

- Approximately 70 percent of construction contractors now operate on an open shop basis.
- The open shop share of the construction marketplace has grown dramatically in recent years because collectively bargained agreements in the construction industry resulted in high wage rates and costly work provisions. Buyers of construction services rejected inflationary wage increases and non-productive work rules resulting in a substantial movement to the open shop sector of the industry to perform their work.
- This market shift, **dictated by owners** of construction projects, had its foundation in marketplace realities and the laws of economics. **Owners** of construction projects recognized that the price for their products was being impacted severely by the cost of building the facilities in which they produced those products. Inevitably, this **owner**-dictated shift in the makeup of the construction marketplace severely impacted

construction unions. This is illustrated by the following facts:

In 1973, the construction industry work force was approximately 40 percent unionized.

By 1985, the unionized segment of the construction industry work force had shrunk to approximately 24 percent. Apparently 76% of the work force prefers to work in open shop under competitive and attractive wages, working conditions and fringe benefits programs.

o The continuing movement to open shop construction created by **owner** decisions mandates that contractors with collective bargaining agreements be responsive to the needs of their customers---project **owners**. Unionized construction firms were faced with three choices:

Discontinue operations entirely as unionized contractors and become open shop contractors.

Go out of business.

Invest in or establish totally separate open shop construction firms.

S. 492, if enacted into legislation, will without question have an impact but not the effect that it presumes. Consider the following:

o open shop firms, periodically performing work on a union basis, will avoid any ties to a collective bargaining agreement;

- union contractors already concerned over the non-competitive nature of their operations would withdraw from any form of multiemployer bargaining to avoid a commitment which is inconsistent with market trends;
- union construction companies would be precluded from investing in the open shop marketplace; yet, any other company or individual would be free to invest in the open shop construction market without having a collective bargaining agreement thrust upon the firm and its employees; and
- The basic right of an individual or firm to invest in an enterprise would be limited. Building trades union members have the option of working on a union or open shop job without limitation. Many are working on open shop projects and that is and should be their right.

Aside from avoiding the reality of competitive market forces, there is another important impact which S. 492 will have. S. 492 would take public policy on labor relations out of a neutral posture. It would deny an employee's right to join or not join a union by imposing the terms of a collective bargaining agreement.

Current Remedies

Proponents of S. 492 complain that this legislation is needed to stem the rising tide of double-breasted enterprises which the unions claim are formed unlawfully by employers to evade their obligations stated in collective bargaining agreements and to deprive employees of their right to unionization. They allege the practice of a union employer setting up an open shop arm and transferring work ordinarily performed by the union company to the open shop company as a frequent and widespread abuse that the NLRB refuses to address. Quite simply, this is not the case.

An analysis of an National Labor Relations Board (NLRB) statistical survey of its regional offices regarding double-breasting (dual shop) unfair labor practice charges in the construction industry (filed October 1983 through July 1986) reveals that:

- "On the average unions have filed fewer than two unfair labor practice charges per state per year involving alleged double-breasting firms."

  There is no evidence to support union contentions that there is widespread abuse of dual shop operations.

- "In over half the states there were no charges filed against employers alleging that a non-union company had been joined to facilitate the transfer of work ordinarily performed by the union company." "...only .1% (one tenth of one percent) allege the conduct which proponents of this legislation claim it is tailored to prevent."

  The facts do not support union allegations regarding the use of dual shop operations to shift work from

a union to a non-union company.

- "Contrary to the unions' claim that the NLRB [illegible] under current law, the NLRB is actually more apt to find merit in charges alleging a single employer [illegible]." In addition, nearly [illegible] percent of the charges filed were disposed of within [illegible] days of filing.

The unions' position regarding the need for legislation is factually flawed. There is no [illegible] and current NLRB administrative procedures and remedies are timely and work when they are used.

The Bill:

Section 2(a)

Section [illegible] defines as a "single employer" any two business entities:

- "Performing or otherwise conducting or supervising"
- "the same or similar work"
- "in the same or in different geographical areas" and
- "Having directly or indirectly substantial common ownership, common management, or common control."

Under current NLRB's standards, whether two entities are deemed a "single employer" depends upon an application of the following tests to the facts of the case:

- Common ownership or financial control;
- Common management;

- Interrelation of operations; and
- Common control of labor relations.

While the labor relations factor is generally considered to be the most important, all factors are reviewed by the NLRB. The principle, which has been upheld in the courts, is that truly separate construction enterprises do no harm to the signatory's obligation to its union under the NLRA. See South Prairie Construction Co. v Operating Engineers Local 627, 425 U.S. 800 (1975) (Kiewit).

Result

Under S. 492, all that would be necessary to bring two construction firms under the same single employer umbrella is direct or indirect substantial ownership, or common management or common control. The current standard looks at these factors together but under the proposed standard of S. 492, any one factor would be sufficient for single employer status. "Substantial common ownership" is not defined, so no one knows how little would be enough.

The "performing or otherwise conducting or supervising" language added to the" directly or indirectly---control" language would include not only the contractor on a project, but its subcontractors (which do "similar" work and are supervised by general contractors). If any job site is made into a "single employer" site by such broad language, a union having a dispute with any signatory employer on that site would be entitled to picket against all its subcontractors on that site, enmeshing neutral employers in the dispute. Other sites of those employers could become part of a multi-situs picket as well. Similar objectives were incorporated in legislation introduced several years ago under the name of "common situs." Congress wisely rejected such legislation then and should do so again.

Section 2(b)

Section 2 (b) of S. 492 would require the signatory firm to impose the terms of its collective bargaining agreement on other "single employer" entities (as defined in Section 2(a) of the bill) within the agreement's jurisdiction. The current practice under Section 9 of the NLRA is for the NLRB to determine whether the additional unit sought to be included is "appropriate' for the purposes of being bound to the labor contract of the signatory employer based on a "community of interests" test. This examination is done even where two entities have been found to be a single employer because of non-separateness.

Result

S. 492 would impose a collective bargaining agreement on a unit operation for which it might be totally inappropriate. For example, a carpenter collective bargaining agreement could be imposed on equipment operators, roofers, iron workers or other trades. Imposing union requirements on the formerly open shop arm of a dual shop would limit the flexibility to use workers in several crafts reducing that firm's competitiveness. Under this provision, the contract would be applied even where another entity already had its own union representatives. For example, in some parts of the country, Steelworkers or Teamsters do construction work, yet this provision would impose a second contract on those firms if they come within the "single employer" unit. Aside from the problems with jurisdictional disputes this would cause, it ignores employee rights to make individual decisions on union representation.

Section 2(c)(1)

Section 2 (c) (1) of S. 492 would give a pre-hire agreement, made before any workers are hired or on site, the status of a mature collective bargaining agreement under Section 9 (a) of NLRA. Whether or not the employer utilized the union hiring hall or otherwise had a majority of workers who supported the union, the contract would apply.

Result

The proponents' concern here is that longstanding Board law allowed employers to repudiate pre-hire agreements before the union proved its majority. See Higdon (NLRB v Iron Workers Local 103, 434 U.S. 335 (1978). But, giving the unions what they have asked for in S. 492, recently the Board ruled that a contractor signatory to a pre-hire agreement is bound to it until it expires or until its employees vote against representation in an NLRB election. John Deklewa & Sons, Inc., 282 NLRB No. 184 (Feb. 20, 1987). An equally devastating effect of Section 2(c)(1) would be that employees working on various sites of the "single employer" entities would have a union imposed upon them and e denied the fundamental rights provided under Section 7 of the Act to decide for themselves whether they wanted union representation or not.

Section 2(c)(2)

Section 2(c) (2) of S. 492 imposes on employees a labor contract they have not sought or consented to. It will apply to them under the "single employer" entity concept unless an NLRB election is conducted under Section 9 (c) of the Act, and results in a vote adverse to the union.

Result

This provision imposes an agreement and a union on individuals without their freedom to choose.

Conclusion

S. 492 will:

- Decrease employment opportunities for union members;
- Restrict the rights of construction workers to determine whether or not they want union representation;
- Cause further erosion of the union construction market; and
- Encourage union contractors to become open shop contractors.

Local Labor-Management Cooperation

As a contractor who operates with collective bargaining agreements, there is nothing I would like more than to increase my market share. But it cannot simply be done through legislation or anti-dual shop clauses. It can only be done through joint labor-management responses to market factors.

A contractor's success in today's marketplace depends upon his degree of competitiveness.

Beginning in 1982 contractors in Western Pennsylvania, in response to shifts in the marketplace, began to assemble facts which documented the loss of work by collective bargaining contractors. This documentation consisted of identifying those projects performed by collective bargaining contractors and those performed by open shop contractors.

The unions were presented with these market facts through our joint labor-management committee. The unions then began to work with their employers to modify collective bargaining agreements during contract negotiations in an effort to remain competitive. Union representatives raised certain issues at the committee meetings, however, which led the contractors to believe that the unions and their constituents were not aware of, and did not understand, many of the problems facing construction companies. For example, many union members believed that contractors' profit margins exceed thirty or forty percent and that any concessions offered in contract negotiations would simply increase these profit margins. In reality, a three percent profit margin is considered excellent.

The contractors responded by holding a seminar for union officials in which they learned how a construction firm operates. At the end of the seminar, the union officials acknowledged that they had a much better understanding of the problems that contractors face and that the unions needed to take action to effect some necessary changes. They expressed an inability to do so, however, because of the political pressures from their constituents. The joint labor-managment committee then established a subcommittee charged with the responsibility of communicating with the rank-and-file union members. The subcommittee decided to use the same approach which succeeded with the union officials; they established an ongoing seminar program for union building tradesmen. The program is entitled, "Construction: Opportunities and Risks."

Approximately 100 union construction workers attended each session and were divided into five person "firms." Each "firm" was given a simplified financial sheet, overhead cost figures and a cost summary of the respective "firm's" prior projects. The competing "firms" were then given 20 minutes to bid on a described project.

The contract for the project was awarded to the low bidder. This "contractor" then drew a "job progress card" for each week of the project. The cards, which were based on actual projects, impose various delays and productivity problems and helped determine whether the "firm" would make a profit. The objective of the simulated conditions was to make union members and leaders aware of the market realities and factors which dictate success or failure.

After completing the workshop, each participant was given an evaluation form in which comments were sought on every aspect of the game and the entire program. Of the first 1,200 tradesmen that attended the workshop, only four indicated that they did not benefit.

To date, more than 4500 building tradesmen have attended the seminar in Western Pennsylvania alone. The program has achieved national recognition and is being used in other states. Some apprenticeship programs have included the seminar in the curriculum.

Most important are the results of the program in Western Pennsylvania. The contractors and six unions negotiated competitive collective bargaining agreements which increased work opportunities significantly.

These results would not have been obtained through legislation or coerced anti-dual shop contract clauses, but only through the response of competition to market forces.

Conclusion

There are ways for construction employers and their unions to be competitive: wage restraint, work rule modification, and increased productivity.

To obtain work in today's construction marketplace, a contractor must be competitive regardless of labor policy. The unions' ability to secure employment for their members is directly related to the ability of collective bargaining contractors to obtain work. Unions must be willing to work with management to negotiate competitive collective bargaining agreements with contractors who employ their members.

S. 492 will accomplish none of this, but rather seeks only to impose collective bargaining relationships in complete disregard of free market forces. S. 492 must be rejected.

(NOTE: In the interest of economy, the attachment accompanying this statement was retained in the files of the Committee.)

STATEMENT OF
NATIONAL COALITION TO DEFEAT S.492

HEARING BEFORE THE
SUBCOMMITTEE ON LABOR
COMMITTEE ON LABOR AND HUMAN RESOURCES
UNITED STATES SENATE

ON

S.492, THE CONSTRUCTION INDUSTRY
LABOR LAW AMENDMENTS OF 1987

June 4, 1987

The National Coalition to Defeat S.492 is a coalition of over 150 business organizations and corporations united in their opposition to the passage of this legislation. The members of the Coalition include not only union and open shop construction firms and their associations, but also manufacturers and other users or customers of construction services and their associations, suppliers and distributors of construction products, and other industries and groups either directly or indirectly affected by the bill or by the precedent its passage would establish. In short, virtually every segment of the American business community is represented in this Coalition.

The Coalition endorses all of the written statements submitted by Coalition members. In particular, the Coalition would note the testimony of the business representatives appearing at the Subcommittee hearing on June 4, 1987. Mr. Richard E. Heckert, CEO of the Du Pont Company, highlighted the concerns of employers who are not directly involved in the construction industry. Especially noteworthy are the anti-competitive effects of S.492. It is ironic that at a time when American industry is faced with extensive foreign competition, and Congress is struggling with efforts to increase American competitiveness and decrease the foreign trade deficit, a bill as anti-competitive as S.492 should undergo serious scrutiny.

The testimony of William C. Pogue, CEO of CBI Industries, a large, legitimate double breasted contractor, explained the devastating implications S.492 will have on the thousands of contractors who currently operate fairly within the law. Finally, testifying on behalf of the National Association of

Minority Contractors, Howard Jenkins, 20-year veteran member of the National Labor Relations Board, clearly demonstrated that current law is adequate to redress the alleged abuses. Moreover, he and Mr. Ralph Thomas, Executive Director of NAMC, explained that enactment of S.492 would cripple efforts by minority contractors to compete in the construction industry, and would present an impediment to their very survival as businesses.

INTRODUCTION

The proponents of S.492 claim that this legislation does not change basic labor law, rather that it "simply requires that construction industry employers live up to their contractual agreements." However, a careful review of S.492 reveals that this legislation radically changes even the most fundamental principles underlying the National Labor Relations Act (Act) as it relates to the construction industry.

The most significant change that would be accomplished by S.492 is contained in Section 2(a) of the bill. That section redefines the term "single employer" in the construction industry for all purposes under the National Labor Relations Act. It does so without regard to whether a collective bargaining agreement is in effect. It must be emphasized that the geographical limitations contained in Section 2(b) of the bill do not apply to Section 2(a). Through its broad redefinition of a "single employer" in the construction industry, S.492 would strip secondary boycott protections from formerly separate contractors merely because of a remote relationship between those companies. S.492 could extend its reach to non-construction companies to the extent that those companies utilize any construction services and S.492 ignores the legitimate rights of open shop contractors and their employees, both of whom will be forced to operate under a union contract regardless of their wishes.

As is set forth more fully below, current law provides ample opportunity for legitimate efforts to enforce existing collective bargaining agreements. Since this is the stated purpose of S.492, the bill simply is unnecessary. However, the true effects of S.492 are far broader. S.492 is anti-competitive, anti-worker, and simply unnecessary. Indeed, if enacted, S.492 would constitute the most significant shift in the balance of power in favor of organized labor since the passage of the Wagner Act in 1935.

The proponents of S.492 attempt to convey the impression that this legislation seeks nothing more than the re-establishment of Congressional intent when the Landrum-Griffin amendments to the National Labor Relations Act were enacted in 1959. Noticeably absent from their arguments, however, is any reference to the legislative history of those amendments in support of the interpretation now advanced. A review of that legislative history clearly demonstrates that S.492 is not a return to the intention of Congress in 1959, but rather a radical departure from the principles established by the Landrum-Griffin amendments. Its proponents make no effort to justify this departure from these well-established policies.

Perhaps most revealing of the true intention of the proponents of S.492 is the statement of J.C. Turner, former president of the International Union of Operating Engineers and one of the key witnesses cited in the Report as testifying in favor of this legislation. In urging the adoption of this legislation to restore construction unions to the "good old days" prior to the 1947 Taft-Hartley amendments, Turner said:

> Now, I don't need to tell you that that was a whole different world from what you are out there fighting today when you can shut down a job in New York to straighten up a job in another town. It was great.

Resolution in support of anti-Double breasting legislation; 32nd convention proceedings, International Union of Operating Engineers, April 9, 1984.

This statement alone demonstrates that the proponents of this legislation are seeking far more than "return to the intention of Congress in 1959."

When this bill first was introduced, its proponents claimed that they merely were seeking to prohibit contractors from establishing sham nonunion operations to siphon work away from the union and thereby evade existing collective bargaining obligations. Now its proponents frankly admit that, in a dramatic [illegible], they seek the outright elimination of double breasting in the construction industry. The provisions of the bill, however, go even further.

There is one undeniable factor common to every double-breasted contractor -- the two independent firms are related through common ownership. This fact, in conjunction with the definition of single employer contained in S.492, demonstrates that the bill is intended not only to abolish all double breasting in the construction industry, whether legitimate or otherwise, but also to extend its reach further to nonunion companies which do not even share common ownership. The definition of "single employer" contained in the bill states that companies sharing substantial common ownership, any common management, **or** any common control shall be deemed a single employer if the other aspects of the definition are satisfied. The terms contained in this definition commonly are in the disjunctive. The satisfaction of any one of these terms will result in single employer status. Thus, two construction companies which do not share any degree of common ownership could nevertheless be deemed a single employer if they shared "common management" or "common control." By definition, such contractors would not be considered double-breasted under existing law.

In attempting to justify the elimination of double breasting in the construction industry, the proponents of S.492 use the following example of what they describe as a "typical" double breasted company.

> A typical example of this tactic is that Company A, which has a collective bargaining agreement with the union, sets up a related company -- Company B, which is operated on a nonunion basis. In some cases, most of the work formerly done by Company A is thereafter done by Company B. In other situations, Company A may go out of business altogether.

This misleading example does not describe a legitimate double breasted contractor. Rather, it describes the creation of a sham contractor which is unlawful under existing law. The first situation, where work is shifted from Company A to Company B, is unlawful under the "single employer" theory. The second situation, where Company A goes out of business altogether, is unlawful under the "alter ego" theory. The proponents of S.492 leave the impression that these two examples are the only types of double breasting which exist in the construction industry today. This is patently false.

A legitimate double-breasted contractor exists not to avoid its relationship with the union, but rather to maintain that relationship. The construction industry is divided into two separate and distinct markets, union and nonunion. These two markets do not have geographical boundaries; they exist in tandem due to the realities of the marketplace and the demands of the construction customer. As a general rule, the open shop side of a double breasted contractor bids on and obtains work in the nonunion market. This is work which otherwise is unavailable to the union side. These companies do not siphon work back and forth, they do not share employees, and they do not have common management. They do, however, have substantial if not total common ownership. By owning two construction companies, one to compete in each of the two distinct markets, a construction company is better able to serve the needs of the construction customer. The proponents of S.492 makes no attempt to discuss these realities in the construction industry or even to acknowledge their existence. However, a proper understanding of historical evolution of the industry is crucial to an understanding of this legislation.

THE HISTORY OF THE CONSTRUCTION INDUSTRY UNDER THE NATIONAL LABOR RELATIONS ACT

The National Labor Relations Act is a delicately woven fabric of rights and obligations. No one section stands in isolation and any changes in the Act can have far-reaching implications. To the extent relevant to the construction industry, in its 52-year history the Act has been amended on only two occasions -- the Taft-Hartley Act in 1947 and the Landrum-Griffin Act in 1959. On each occasion, the amendments were considered carefully, consuming a substantial amount of legislative time. By way of example, a recent reprint of the legislative history of the Taft-Hartley Act comprises over 1600 pages of reports and floor debates; a similar reprint of the legislative history of the Landrum-Griffin Act, consumes over

1900 pages. The infrequency of amendments to the Act as well as the degree of examination which each amendment received, demonstrates that any new changes in the Act should be considered very carefully. A brief review of this evolution of the National Labor Relations Act as it relates to the construction industry is set forth below.

The Wagner Act

The Wagner Act, passed in 1935, granted employees the right to form, join, or assist unions and established the National Labor Relations Board to protect those rights. Under the Wagner Act, the Board declined to assert jurisdiction over the building and construction industry. This was, in part, because the industry was substantially organized and thus the Board did not believe that workers in the industry needed the protections of the Wagner Act. Also, the Board believed that even though construction employers technically were engaged in interstate commerce, disputes on particular job sites were essentially local in character and therefore the assertion of jurisdiction would not effectuate the policies of the National Labor Relations Act. *See*, *e.g.*, *W.S. Bellows Construction Company*, 51 NLRB 820 (1943); *Johns Manville Sales Corporation*, 61 NLRB 1 (1945); and *Ozark Dam Constructors*, 77 NLRB 1136 (1948).

As the Board's experience under the Wagner Act developed, however, it became readily apparent that labor disputes in the building and construction industry could have a profound effect on interstate commerce. Construction companies frequently were the target of crippling secondary boycotts, thus impeding the progress of massive construction projects. Also, construction workers were forced into unions through restrictive closed-shop agreements and were subject to discharge for violation of even the most trivial internal union rules. However, since the Wagner Act did not grant employees and their employers the now-familiar protections from these types of abuses, the Board was powerless to act. These and other abuses by organized labor led to the enactment in 1947 of the Labor Management Relations Act, also known as the Taft-Hartley Act.

The Taft-Hartley Act

The Taft-Hartley Act amended the National Labor Relations Act in several respects. To remedy the abuses described above, Section 8(b) was added. Section 8(b)(2) was enacted to protect employees from discrimination by their union and Section 8(b)(4) was incorporated to prohibit secondary boycotts. Since the legislative history of the Taft-Hartley Act clearly demonstrated that Congress intended the Board to exercise jurisdiction over the building and construction industry and to put an end to the abuses described above, the Board began to assert jurisdiction over the industry.

As the Board's experience with the construction industry developed, however, it became apparent that the unique and well-established practices of the industry did not correlate with the industrial model on which the Act was based. It also became clear that the legislative changes had failed to eliminate secondary boycotts completely. Accordingly, in the late 1950's Congress began considering amendments which would conform the Act with the established practices in the construction industry and which would end secondary boycotts. These amendments were incorporated into the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), commonly known as the Landrum-Griffin Act.

The Landrum-Griffin Act

The Landrum-Griffin Act added two provisions intended to reflect the existing practices in the construction industry. The first was an exception to Section 8(e) of the Act, the so-called "hot cargo" provision. The other was Section 8(f), the so-called "pre-hire" provision. In addition, Section 8(b)(4) was modified to prohibit secondary boycotts more effectively, while a proposal to allow "common situs" picketing was rejected.

Section 8(e) of the Act prohibits so-called "hot cargo" agreements whereby an employer agrees to cease doing business with another person. Under a proviso to Section 8(e), however, in the construction industry a collective bargaining agreement lawfully may require a construction company to contract job site work only to other union construction companies. Through the use of these agreements, an all-union construction market is created. These agreements are not entirely voluntary, as unions may strike in order to obtain them. In all other industries, except the garment industry, these agreements are unlawful.

Section 8(f) of the Act makes pre-hire agreements lawful in the construction industry. A pre-hire agreement is a collective bargaining agreement which is entered into at a time when the union does not represent a majority of the contractor's employees. Such agreements are an exception to the general rule that employees must choose whether to be represented before a union and employer are allowed to negotiate over the wages, terms and conditions of employment. As its name indicates, a pre-hire agreement generally is entered into prior to the commencement of a project and before the contractor has hired any employees. Again, in any other industry this would be unlawful. However, prior to 1959 pre-hire agreements were a well-established practice in the construction industry. They often were necessary to allow contractors to predict their labor costs and to assure them of a ready source of skilled employees. Accordingly, the law was amended to reflect this reality.

The legislative history of Section 8(f) demonstrates that pre-hire agreements were intended to be entirely voluntary. The House Conference Report on the LMRDA states:

> The conference adopted the provision of the Senate bill permitting prehire agreements in the building and construction industry. [section 705] Nothing in such provision is intended to . . . authorize the use of force, coercion, strikes, or picketing to compel any person to enter into such prehire agreements.

Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, Volume 1 at 946 (official reprinting 1985).

In addition, during the floor debate Congressman Graham Barden, the floor manager for the Conference Report, cited as controlling the following colloquy between Senators Kennedy and Holland concerning the precursor of Section 705 of the LMRDA:

> Mr. Holland. Was it the intention of the committee that Section 604(a) shall require employers to enter into pre-hire agreements where the union has not been the recognized or certified agent of the employees involved?
>
> Mr. Kennedy. I shall answer the Senator from Florida as follows -- and it is my intention,

> by so answering, to establish the legislative history on this question: It was not the intention of the committee to require by Section 604(a) the making of pre-hire agreements, but, rather to permit them; nor was it the intention of the committee to authorize a labor organization to strike, picket, or otherwise coerce an employer to sign a pre-hire agreement where the majority status of the union had not been established. The purpose of this section is to permit voluntary pre-hire agreements. This is because of the inability to conduct representation elections in the construction industry.

Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, Volume 2 at 1715 (official reprinting 1985).

Thus, it is clear that pre-hire agreements in the construction industry are voluntary relationships permitted by Congress since 1959.

The Construction Marketplace - Union vs. Open Shop

As indicated above, at the time the Wagner Act was passed in 1935, the construction industry was substantially organized. Although some work was performed by non-union, or open shop, contractors, the overwhelming majority of construction work was performed on a union basis. In these early days of the Act, construction unions were able to enforce their all-union construction policy through the use of secondary boycotts and restrictive closed-shop contracts. Under a closed-shop contract, non-union employees were not even eligible to be considered for employment by a union contractor. Thus, even in the earliest days of the Act the construction industry was separated into the union market and the open shop market.

Construction unions and the contractors signatory to labor agreements continued their near-monopoly of the construction industry throughout the 1930's, 40's and 50's. The enactment of the LMRDA in 1959 legitimized certain practices in the construction industry which served to perpetuate this monopoly. Thus, construction unions could enter into lawful pre-hire agreements with union contractors which precluded those companies from contracting with any non-union contractors. Construction unions also were free to decide not to sign a contract with a particular contractor, thus giving the unions complete control of the extent of competition. In addition, although closed-shop agreements no longer were lawful, these pre-hire agreements could require the employer to use union hiring halls as their exclusive source of employees and could require union membership within 7 days of the date of hire. Thus, the division of the construction industry into two separate markets -- union and open shop -- was now declared to be national policy.

Other laws, such as the Davis-Bacon Act, also fostered the construction unions' near-monopoly of the construction industry. While the Davis-Bacon Act does not by its terms preclude open shop contractors, as a practical matter the work rules and other practices now required by federal law prove to be a substantial deterrent to them. Accordingly, under the Davis-Bacon Act, work typically is performed by union contractors with "all-union" pre-hire agreements.

The evolution of the construction marketplace into two segments, union and open shop, has in no small part been due to the efforts of construction unions to monopolize the industry.

Construction unions have engaged in various actions, both lawful and unlawful, to discourage union contractors as well as construction customers from utilizing the services of open shop contractors. These practices have included crippling secondary boycotts and legislative efforts to legalize their exclusive and anti-competitive contracts. Notwithstanding these substantial impediments to its existence, open shop construction continued to grow due to market demand by construction customers.

To a large extent, the two marketplaces for construction services are distinct and mutually exclusive. Of course, in some areas there is a certain amount of overlap between the two on individual projects, commonly referred to as "merit shop" projects. There, contractors are selected solely on the basis of their bid and their ability to perform the required services. The union construction firms which successfully compete in this market have been able to do so by persuading the construction unions to abandon their prior restrictive work practices and costly work rules, at least for the duration of the merit shop project.

Merit shop construction has had varying degrees of success throughout the country. In areas where open shop construction does not represent a significant share of the market, union construction has no direct competition and little incentive to moderate its practices. Where open shop construction has a more substantial presence, competitive forces encourage union contractors to attempt to improve their productivity in order to bid successfully for work. When construction unions cooperate with these efforts, the "merit shop" concept succeeds. If they do not, projects usually are built exclusively open shop. Nevertheless, even in areas where the "merit shop" concept otherwise would succeed, there remain some construction customers that do not wish to risk work stoppages and jurisdictional disputes which are commonplace in union construction. Those customers continue to insist that their projects be built exclusively open shop.

The Growth of Open-Shop Construction

Open shop construction has existed in various degrees throughout the history of the National Labor Relations Act. In the 1950's, however, the open shop began to represent an increasing percentage of the market. The construction unions' monopoly over large segments of the industry continued throughout most of the 1950's. During this time period, American-made products received little competition from foreign markets. In view of this absence of competition, the manufacturers and suppliers of American-made products had little incentive to examine the costs of construction services. Rather, their primary concern was in having their construction projects completed in a timely manner regardless of cost since those costs could ultimately be passed on to the consuming public.

Beginning in the 1960's, however, American manufacturers and suppliers began to receive stiff challenge from abroad. This competition precluded manufacturers from continuing to transfer their construction costs to the consumer. Accordingly, domestic manufacturers and suppliers realized that in order to remain competitive, costs of all types, including construction costs, had to be controlled. As a result of this examination of construction costs, the use of competitive bidding was expanded. In many instances, open shop construction firms that had in the past been precluded from bidding on many construction projects both by lawful "all-union" contracts and through the threat of unlawful secondary boycotts were given the opportunity to bid for the first time. Because open shop contractors were not saddled with the antiquated and restrictive work practices which had evolved in union construction, their productivity in many instances was superior to that of union construction companies. This enabled these open shop contractors to obtain work which previously had been denied them.

The shift of the marketplace from union construction toward non-union construction began slowly at first due to the strong reaction of the construction unions. Construction projects that operated on an open shop basis were subject to violent picketing, secondary boycotts, and destruction of property. Merit shop projects were virtually unknown due to the refusal of construction unions to work on such projects. Nevertheless, because of the competitive forces which prompted the expansion of the competitive bidding process, the market for open shop construction continued to grow.

The Practice Known As Double Breasting

As the market for open shop construction flourished, the market for union construction diminished. By way of example, from a near-monopoly of the construction industry in the early 1950's, union construction represented only 40% of total construction employment by the early 1970's. By 1980, union construction had fallen to 35%. With the market for union construction shrinking at an ever-increasing rate, the owners of union construction firms had few alternatives. They could compete only in the shrinking union market, they could leave the union market and compete only in the open shop market, or they could choose to compete in both marketplaces. The owners of union construction firms who wished to compete in the open shop market yet retain their ties with organized labor chose to purchase or form separate companies to perform open shop work. This is the practice which is known as "double breasting."

Many of the nation's largest, most well-established, and most-respected construction firms operate double breasted. They do so in order to compete in the markets which have evolved over a period of decades to meet the requirements of their construction customers. Again, these companies are double breasted in order to maintain a collective bargaining relationship with the construction unions, not to avoid such a relationship. They operate on this basis in order to do business in markets which otherwise are closed to them. This enables double breasted companies to remain competitive and responsive to the demands of the marketplace. Thus, although the construction unions might prefer to have the industry entirely unionized, the practice of "double breasting" is neither unlawful nor illegitimate.

Double breasting in and of itself does not enable a contractor to "avoid" an otherwise legally binding agreement. It is the collective bargaining agreement which defines which companies are covered. The scope of these contracts normally is worded carefully and is the subject of give and take at the bargaining table. The unions which themselves are parties to these agreements are well aware that the open shop sides of these companies are not covered by the scope of the agreements. In many instances unions have signed numerous contracts over the years with the union sides of double breasted employers with the full knowledge that the contracts did not cover open shop sides. Likewise, construction unions consistently enter into project agreements with other open shop contractors when it is in their interest to do so. Thus it can hardly be said that double breasting is a device to "sneak around" a collective bargaining agreement that the unions legitimately believed covered a double breasted company's open shop arm.

"Double breasting" as a concept is not confined to the construction industry. In the trucking industry, for example, separate trucking companies may be related through ownership or otherwise, yet nevertheless have independent labor relations policies. Thus, such companies both may be unionized, whether by the same or different unions, both may be open shop, or one may be union and the other open shop. Indeed, within one trucking company the employees may or may not be organized depending upon the terminal from which they work. Similarly, in the mining industry related mine owners as well as individual mines may or may not be organized depending upon their unique circumstances. In these industries, the area in which the related companies operate is irrelevant, as is the fact that these companies may or may not compete with each other. What is relevant, both in these and in all other industries, is the wishes of the employees. Those who desire union representation are allowed union representation; those who wish to work open shop are allowed to do so.

THE ALLEGED "NEED" FOR S.492

The proponents of S.492 claim that employers in the construction industry are able to avoid their collective bargaining obligations in two distinct ways. They allege that (1) through double breasting union contractors are lawfully able to establish sham, non-union operations and then to shift work from union operations to those non-union operations, and (2) union contractors are lawfully able to "walk away" from pre-hire agreements at will. They further assert that S.492 is narrowly focused to address these alleged problems and that it "does not change basic labor law."

The Coalition's response to these simplistic arguments is straightforward. The first argument is a patently false characterization of current law. The second argument was a substantially erroneous and seriously misleading statement of prior law and it is a totally false representation of current law. In addition, S.492 is not narrowly focused, but rather is stated in the broadest possible language extending its scope well beyond the alleged problems it is intended to address.

The Coalition has produced compelling evidence that under the well-established law concerning the doctrines of single employer and alter ego, current law is not deficient in preventing shams. Employers who establish sham, non-union operations consistently are required to apply their collective bargaining agreements to those operations. As to the alleged ability of contractors to "walk away" from pre-hire agreements, although there has been substantial debate concerning the proper interpretation of Section 8(f) of the National Labor Relations Act, a recent decision of the National Labor Relations Board has rendered this issue moot. In John Deklewa & Sons, 282 NLRB No. 184 (Feb. 20, 1987), the Board abandoned its prior doctrine and held that pre-hire agreements are binding throughout their term and directly enforceable.

In addition to refuting the arguments in support of this bill, the Coalition has demonstrated that the true objective of this legislation is to sweep formerly separate, legitimate operations under this bill's all-encompassing definition of "single employer." It has also been shown that the underlying goal is to force collective bargaining agreements upon formerly open shop employers against their will and without their employees' consent. It should be noted that in the 99th Congress, union lobbyists informed many members of the House that they had no intention of including large, nationally recognized, double breasted construction companies within the scope of this bill. However, these same lobbyists have now shifted their position and revealed their true intent to outlaw all double breasted operations, whether legitimate or not. Indeed, in his testimony before the Subcommittee on Labor, AFL-CIO Building and Construction Trades Department President Robert Georgine freely admitted that this was their objective.

EFFECTIVENESS OF CURRENT LAW

The "Sham" Operation

The proponents of S.492 claim that the current labor laws are either inadequate or inadequately enforced to prevent union construction companies from setting up and then shifting work to "sham" non-union construction arms to avoid existing union contracts. Such claims seriously misrepresent the current state of the law.

The existing labor laws are entirely satisfactory and sufficiently enforced to prevent the types of abuses which the proponents of S.492 have described. For example, under the "single employer" doctrine, the National Labor Relations Board and the federal courts consistently have found that two commonly owned and commonly managed companies that function together with common labor relations policies constitute one, single employer so that the labor agreement of one may cover the employees of the other. Under the *alter ego* doctrine, when the owners of a union company form another organization to which they transfer portions of their business and customers in an effort to avoid existing union contracts, the Board and the federal courts have applied the terms of the contract to both entities or have held both companies to be liable for each other's unfair labor practices. Thus, the current labor laws applied to "single employer" and *alter ego* situations already address the alleged abuses claimed by proponents of S.492.

Moreover, contrary to the allegations of proponents of S.492, the labor laws applied to these two doctrines have been consistently interpreted and enforced by the National Labor

Relations Board and the federal courts for over 20 years, through both Republican and Democratic administrations. There has not been a "new interpretation" in this area of the law by the so-called "Reagan Board." For example, in Walter N. Yoder & Sons, Inc., 270 NLRB 652 (1984), relying upon well-established Board and court law, the Board recently summarized the relevant principles as follows:

> A "double-breasted" operation is one in which a contractor operates two companies, one unionized and the other non-unionized. Depending on how the companies are structured and operated, each may be a separate corporation or else both may be so interrelated that they constitute a single employer or one may be the alter ego of the other. A collective bargaining contract signed by one of the companies would not bind the other, if each were a separate corporation, but would bind the other if both constituted a single employer and the employees of both companies constitute a single appropriate bargaining unit, or the non-signatory company is an alter ego of the signatory company. Associated General Contractors of Calif., 242 NLRB 891, 893 fn 5 (1979), enf'd as modified, 633 F.2d 766 (9th Cir. 1980) cert. denied, 452 U.S.915 (1981); Burgess Construction, 227 NLRB 765,770-71, 773-74 (1977), enf'd, 596 F.2d 379 (9th Cir. 1979), cert. denied, 444 U.S. 940 (1979); George C. Shearer Exhibitors Delivery Service, 262 NLRB 622, 623-24 (1982), enf'd mem., 114 LRRM 2976 (3d Cir. 1983).

Yoder & Sons, 270 NLRB at 653 n.2.

It is clear, therefore, that the Board continues to apply the same standards as it has in the past.

Nevertheless, if the unions honestly are dissatisfied with the Board's handling of such cases, they have open to them two other avenues of relief. Unions claiming that a contractor is improperly transferring work to avoid a collective bargaining agreement may file a lawsuit in federal court against the contractor for breach of contract under Section 301 of the Act, or they can pursue their remedies through arbitration. The argument that existing procedural avenues are inadequate to prevent employers from forming sham subsidiaries in an effort to avoid the collective bargaining agreements simply is belied by the facts.

Attached hereto are summaries of cases where the Board and courts have found "single employer" or alter ego status, and where, as a remedy for the employer's refusal to bargain, they have applied a collective bargaining agreement to both companies or have held both companies liable for each other's unfair labor practices. These cases provide a representative sample of those arising in the construction industry (marked with an asterisk) and in other industries. These sixty-seven cases illustrate that current law more than adequately addresses the alleged abuses which the supporters of S.492 have claimed the bill seeks to correct.

Some of the cases are identified clearly as not involving employers in the construction industry. They are included to demonstrate that the law applied in the construction industry is the same law that is applied for every other industry. The proponents of S.492 have pointed to no reason whatsoever as to why the construction industry should be treated any differently in this regard. Rather, they attempt to argue that because only 30 or 40 cases have been cited, these are the only ones that the unions have successfully fought. This is, of course, a highly misleading statement. First, this list of cases does not purport to be exhaustive; it is a representative sample. Second, the proponents of S.492 are well aware that over 95% of charges of all types which are brought before the National Labor Relations Board are disposed of by settlement or otherwise prior to a final reported decision of the Board.

Current law precludes union contractors from establishing sham, non-union companies and shifting work from the union company to the non-union company. Contractors who do so are required to apply the union contract at all locations and make whole all affected employees. Since this is the stated purpose for Sections 2(a) & (b) of S.492, those sections are unnecessary.

The Enforceability of Pre-Hire Agreements

For the past several years the proponents of S.492 have argued that the sole purpose of Section 2(c) of the bill, the so-called "pre-hire" provision, was to prevent employers from walking away from agreements into which they had voluntarily entered. They claimed this was unfair, although the parties to pre-hire agreements knew the agreements were only conditional until such time as the union obtained majority support. Thus, it never was true that employers could simply "walk away" from these pre-hire agreements if the unions were supported at any time by a majority of workers covered by the agreement.

Recently the National Labor Relations Board issued a decision which renders this "pre-hire" issue moot. In *John Deklewa & Sons*, 282 NLRB No. 184 (Feb. 20, 1987), the NLRB overruled its prior interpretation of Section 8(f) of the Act and held that pre-hire agreements are binding throughout their terms and are fully enforceable. As in Section 2(c) of the bill, the agreements may not be repudiated unless the union is rejected by a vote of the employees. After the expiration of such agreements, construction companies may choose to enter into subsequent pre-hire agreements, but are not required to do so. This is in recognition of the fact that pre-hire agreements are voluntary arrangements with a union that does not represent the employer's employees. Of course, as in all industries, if a union establishes that it represents a majority of the employees of a construction company, that company must continue to deal with the union.

Although it would seem that the Board's decision in Deklewa resolves the stated concerns of the proponents of this legislation, it appears that they are not satisfied. Thus, the construction unions continue to press for Section 2(c) of the bill, which they only now interpret as perpetuating the terms and conditions of a pre-hire agreement after it has expired. Under this new interpretation, a construction company would be required to continue to deal with the union after the expiration of the pre-hire agreement, even though the union never has established that it represents the employees of that company. Without any justification, this interpretation of Section 2(c) of this bill would not only bind an employer for the specific period to which he agreed, it would bind him to the union perhaps in perpetuity. Congress would be thrust into the collective bargaining process and pre-hire agreements would be converted from voluntary relationships permitted by Congress since 1959 into compulsory relationships required by Congress.

Deklewa establishes hard and fast rules by which both employers and unions can live. It is as clear as any legal standard can hope to be. Deklewa accomplishes the unions' stated purposes for Section 2(c): Pre-hire agreements are binding and cannot be repudiated. Thus, Section 2(c) of S.492 is unnecessary.

THE EXPANSIVE SCOPE OF S.492

S.492/H.R.281 and the House Substitute

S.492, and its House companion H.R.281, contain three principal changes in current law. Section 2(a) of the bill introduces an expansive new definition of the term "single employer" as it relates to the construction industry. Section 2(b) requires any companies falling within this broad definition to abide by any applicable collective bargaining agreements signed by any one of the other companies within the definition. Finally, Section 2(c) of the bill declares that pre-hire agreements are binding throughout their term and are directly enforceable.

As originally introduced, S.492 and H.R.281 contained identical language in relevant parts. This language is seriously flawed and, as discussed more fully below, would permit secondary boycotts and common situs/multi-situs picketing, modify existing collective bargaining agreements, ignore the rights of open shop employees, involve non-construction employers in construction industry labor disputes, and, at least according to its proponents, extend pre-hire agreements beyond their terms.

Recognizing at least some of these serious deficiencies, on March 31, 1987, the House Subcommittee on Labor-Management Relations adopted by a vote of 10-6, and reported to the Education and Labor Committee, an amendment in the nature of a substitute for H.R.281. The substitute amendment was offered by the Subcommittee Chairman, Rep. William L. Clay (D-MO), the principal sponsor of H.R.281.

In a statement in support of his substitute amendment, Rep. Clay acknowledged that the changes were in response to "legitimate" concerns about what he described as "ambiguities" in the original bill. In fact, despite Rep. Clay's original protestations about the "rhetoric" that H.R.281 would permit the practice of common situs picketing, his substitute amendment now attempts unsuccessfully to remove the very real common situs picketing implications from the original language of H.R.281. These and other legitimate, and now acknowledged problems with the original language of S.492/H.R.281 are not resolved by the substitute adopted in the House, nor does it reduce the Coalition's opposition to this legislation.

The Coalition continues to oppose S.492 and the modified H.R.281 for the following reasons. First, both continue to eliminate dual shops, or "double breasting," in the construction industry without distinction between those double-breasted contractors (including many of the country's largest and most-respected construction firms) which are established and operated lawfully, and those which are not. Proponents of this legislation claimed originally that their only intention was to prevent union contractors from creating related, sham nonunion operations to which they could siphon work and thereby evade existing collective bargaining obligations. Unfortunately, however, sham operations are not the only targets of this legislation. Rather, the effect of the bill and the proponents' newly stated intent is simply to eliminate all double breasting, whether legitimate or otherwise. The minor modifications to H.R.281 adopted in the House do not alter this fundamental objection to the bill.

Second, the Coalition has raised serious fundamental objections to the pre-hire section of the original bill, as interpreted by its proponents. The House substitute fails to address these concerns. In effect, this legislation converts a pre-hire agreement, voluntarily entered into by an employer and a union, to a compulsory relationship extending beyond the expiration of the term of that agreement. Proponents of S.492/H.R.281 claimed originally that this section of the bill was designed simply to prevent employers from repudiating or "walking away" from pre-hire agreements before they expired. The National Labor Relations Board's recent decision in John Deklewa & Sons, 282 NLRB No. 184 (February 20, 1987), addresses fully that alleged concern. The Board ruled that neither employers nor unions may unilaterally repudiate pre-hire agreements during their term unless the employees covered by the agreement vote in a Board-conducted election to reject the union.

Proponents of S.492/H.R.281 now acknowledge that an additional, and perhaps the primary purpose of the bill's pre-hire section is to bind employers and workers to such agreements beyond their term. Thus, the unions seek a presumption of majority status beyond the term of pre-hire agreements even where a union does not represent a majority of the employees. Under this change in the law, unions would be able to compel an employer to negotiate or adopt a successor agreement based solely upon the existence of a pre-hire relationship. The union could lawfully strike or picket to force the employer to sign a successor pre-hire agreement.

Third, in offering his substitute, Rep. Clay stated that his purpose was to resolve the controversy which has arisen concerning the common situs picketing aspects of S.492/H.R.281 and the impact of the bill on non-construction employers. Unfortunately, the substitute does not resolve either of these issues. Moreover, no effort was made to address the other serious problems raised by the bill. Finally, the substitute itself creates additional problems not raised by the original bill.

These serious problems raised by S.492/H.R.281, and left unresolved in the House Substitute, are discussed in detail below.

SECTION 2(a) - The Definition of "Single Employer"

The Legalization of Secondary Boycotts

Section 2(a) of S.492 would create a single employer in the construction industry of two employers "in the same or in different geographical areas" with substantial common ownership, any common management, or any common control. This new definition would apply for all purposes under the National Labor Relations Act and is not dependent upon the presence of a collective bargaining agreement. In fact, two companies could be found to be a single employer under this bill even if neither company had a collective bargaining agreement with the union. The proponents of S.492 do not attempt to refute this fact, but rather they seek to confuse the issue by referring to the language in Section 2(b) of the bill concerning the application of any existing contracts. However, as noted above, the new definition of "single employer" in Section 2(a) is not dependent upon the existence of a collective bargaining agreement.

H.R.281, as modified, at least requires that contractors actually perform work in the same geographic area to be considered a single employer. However, while the House substitute adds a geographical test to the definition of "single employer," it does nothing to thereafter geographically limit the ramifications of a finding of single employer status. As a result, once the substitute definition is satisfied the companies would still be considered a single employer for all purposes under the Act and without geographic limitation. Thus, a union could picket an employer in one area of the country in order to force a related employer in another part of the country to sign a collective bargaining agreement. Indeed, the elimination of secondary boycott protections is one of the major gains which the unions are seeking in this bill. (See statement of J. C. Turner quoted on page 4.)

This expanded picketing/elimination of secondary boycott protections would occur even if each of the companies comprising the single employer was complying with its obligations under the law. For example, assume Company A is a union contractor performing carpentry work in the New York City area. Company A is owned by a holding company which also owns Company B, an open shop construction company which performs work nationwide. Under the substitute, if Company B were to perform carpentry work in the New York City area, it would be considered a single employer with Company A and it would be obligated to abide by Company A's union contract. Even if Company B fully complies with its obligations under the contract while in the New York City area, however, as an entity of the single employer Company B would now be subject to picketing anywhere in the country by a union having an unrelated dispute with Company A. Also, Company A would be subject to picketing in New York because of a dispute with Company B anywhere in the country. This is so because the effects of a single employer finding are not limited in any respect by Section 2(a) of the substitute. Thus, under the substitute, related employers would continue to lose their secondary boycott protections nationwide merely because they lawfully chose to conduct business in the same area and to lawfully abide by the union contract in that area.

Additional secondary boycott problems would be created where commonly owned, managed or controlled construction companies operate in the same geographical area but perform different types of construction. For example, a holding company which owns a union contractor performing commercial construction work might also own a non-union construction company engaged in residential construction work. Obviously, in both types of work, carpenters, electricians, plumbers, etc. all perform similar functions. Although these contractors do not compete with each other in any way and no argument has been made that they should be considered a single employer, H.R.281 would deem them a single employer due to their common ownership. Thus the commercial contractor could be subject to picketing in order to compel the residential contractor to recognize the union and that same contractor may be required to abide by the terms of the commercial operation's union contracts. This is not what the proponents of this legislation claim they intend, but it clearly is what the language of S.492 and H.R.281, even as modified, would accomplish.

Common Situs Picketing

The proponents of S.492 claim that the bill does not legalize common situs picketing. However, the very breadth of the "single employer" definition leads one to the conclusion that it would permit this activity under another name. The bill would find two businesses engaged in the same or similar work having directly or indirectly any "common management" or "common control" to be a single employer. Quite clearly, subcontractors on a job site are under the common control of the general contractor.

The proponents of S.492 attempt to dismiss this by stating that the two entities must be engaged "in the same kind of work" in order to be considered a single employer. However, the bill itself uses the broader term "same or similar work." What constitutes the same or similar work in the construction industry is open to debate. The proponents of S.492 argue for a distinction along traditional craft lines, but it is plain, especially in open shop construction, that contractors are not broken down by crafts. Even in the union sector, a subcontractor may employ workers from four or five different crafts. But more, if the craft distinctions were as clear as the proponents of S.492 seem to indicate, there would be no jurisdictional disputes on union job sites.

The proponents of S.492 do not go so far as to say a general contractor never can engage in "the same or similar work" as one of its subcontractors. In fact, in the open shop area, it is quite common for a general contractor to do all of the work on one project and subcontract out some of that same work on another job site. Thus, it is entirely possible that the NLRB or courts could construe subcontractors on a project to be performing the "same or similar work" so as to come within the "single employer" definition. Union attorneys undoubtedly will urge the Board and the courts to adopt such an interpretation.

Moreover, even assuming that a general contractor and its subcontractors would not be considered to be engaged in the same or similar work, frequently on job sites two or more subcontractors are retained to perform what even the proponents of S.492 would concede is the "same or similar work." For example, an electrical contractor may be retained to do the regular wiring of a building while a separate contractor would install computer cables, and a third contractor would install telephone lines. Each of these functions would entail similar tasks -- pulling wire through conduit, making electrical connections, and the like. These contractors would all be subject to the control of the general contractor or construction manager and thus would be deemed a single employer under S.492. Furthermore, on large construction sites there may be more than one general contractor, each responsible for a different aspect of the project. Undeniably each of these companies is engaged in the business of general contracting and all are subject to the common control of the owner of the project. Thus, under S.492 these separate general contractors would be deemed a single employer.

Acknowledging these "legitimate" concerns regarding common situs picketing, the modified H.R.281 alters the definition of "single employer" in Section 2(a) and adds a related proviso. The changes in the definition of "single employer" include removing the reference to "conducting or supervising" work and adding a requirement that common management or common control be "substantial." Also, the reference to "the same or similar work" is replaced with language referring to "the type of work described" in a union contract. The proviso which was added to the definition of "single employer" states:

> Provided, that the existence of a contractor-subcontractor relationship between any two or more business entities working at a construction site shall not, by itself, be deemed to create a single employer or be considered as evidence of direct or indirect common management or control, within the meaning of this sentence.

The contractor-subcontractor proviso and the related adjustments to the definition of "single employer" do not eliminate concerns that this legislation will privilege a form of common situs picketing. The proviso only indicates that the mere existence of a contractor-subcontractor relationship shall not create a single employer or be considered as evidence of common management or common control. However, it never was argued that this relationship in the abstract would result in single employer status. Rather, it is the substantial, pervasive control frequently exercised by general contractors which would lead to a single employer finding. Irrespective of whether the relationship itself would be evidence of common control, single employer status under the House substitute could still be based on the degree of actual control typically exercised by a contractor over a subcontractor. It should be noted that the House substitute bill continues to treat the tests for single employer status in the disjunctive. Thus, "substantial common control" alone would be sufficient to trigger the application of the bill. If that were not true, and the contractor-subcontractor relationship could not support a finding of single employer status under any circumstances, then one must ask why the element of "substantial common control" is necessary.

An example of the extensive control exercised by a general contractor/construction manager, even one not normally thought of as being a construction employer, can be found in A. L. Adams Construction Company v. Georgia Power Company, 733 F.2d 853 (11th Cir. 1984). In that case, Georgia Power functioned as its own general contractor on a nuclear power plant construction site. The court described the control exercised by Georgia Power as follows:

> Georgia Power, for itself and as agent for the other owners, oversees the entire project . . . Georgia Power provides all the contractors' equipment, pays their insurance, and sets the work schedules and rules. The contractors can hire only the number of employees authorized by Georgia Power.

> Georgia Power controls the time, manner and method of the construction . . . .

Id. at 854, n.3.

This type of control is not unusual on a large construction site, and flows from the general contractor's contractual relationship with its subcontractors. If this type of control does not constitute "substantial common control" within the meaning of the bill, it is difficult to imagine what could.

Thus, neither the contractor-subcontractor proviso nor the requirement that common control be "substantial" eliminates the legitimate concern that this legislation will privilege common situs picketing. Moreover, the proviso refers only to the contractor-subcontractor relationship while ignoring the relationship among various subcontractors on a particular job site. This leaves open the question of whether the various subcontractors on a job site could be considered a single employer. This concern is highlighted by the additional change in the definition of "single employer" to include a reference to "the type of work described" in a union contract. Frequently, on union construction sites there are jurisdictional disputes between the employees of the various contractors as to which group of employees is entitled to perform certain work. Each of these competing groups claims that their contract covers the work in question. Since the contractor performing the work arguably is "performing the type of work described" in the other contractor's union contract, these otherwise unrelated subcontractors could be considered a single employer. Thus, the mere existence of a jurisdictional dispute could trigger a single employer finding and privilege picketing of the various subcontractors involved in that dispute. This would be a form of common situs picketing, and nothing in the House substitute bill would preclude such a finding.

Multi-Situs Picketing

Through the combination of the legalization of secondary boycotts and common situs picketing, the previously unknown concept of multi-situs picketing becomes a reality. A construction union would not only be able to picket each of the employers constituting the "single employer" at a particular job site. It would also be able to picket any one of those employers at any other project at which they could be found anywhere in the country. The labels "secondary boycott," "common situs" and "multi-situs" merely describe different aspects of the expanded picketing which would be permitted by S.492. With the broad definition of "single employer," construction unions without question will be able to engage in other types of expanded picketing which have not yet been foreseen.

Sponsors of S.492 have stated that they do not intend to permit expanded picketing. However, since the expanded picketing rights flow from the definition of "single employer" contained in Section 2(a) of the bill, that definition must be changed to reflect this intention. Moreover, it is unlikely that the concerns about expanded picketing can be addressed through minor modification of this definition, such as the changes on the House substitute. It is the fundamental concept of a broad definition of "single employer" which permits secondary boycotts, common situs picketing, and multi-situs picketing. Thus it is the fundamental concept which must be changed.

Non-Construction Employers

The proponents of S.492 note that this bill applies only to employers "in the construction industry." Accordingly, they argue that since a manufacturer is not "in the construction industry," it would not be affected by this law. However, it is clear that employers who are not commonly thought of as contractors have been found to be "in the construction industry" under current law. Thus, it has been held that a power company and a shipbuilder can be "engaged primarily in the building and construction industry" for purposes of the National Labor Relations Act. Even a fried chicken franchise has been held to be "in the construction industry" for the purposes of section 8(e) of the Act, a related construction industry provision. A. L. Adams Construction Co. v. Georgia Power Co., 733 F.2d 853 (11th Cir. 1984); Zidell Explorations, Inc., 175 NLRB 887 (1969); Church's Fried Chicken, 183 NLRB 1032 (1970) (respectively). In fact, one recent case which the proponents of S.492 cite as an example to justify this legislation did not involve a construction company at all. Rather, that case involved the husband and wife owners of an ACE Hardware Store who sought nothing more than to have an addition built onto their store. Carpenters Local 2247 v. Endicott Enterprises, Inc., ___ F.2d ___, 124 LRRM 2265 (9th Cir., December 19, 1986).

Manufacturers, retailers, and other non-construction employers who have their own construction divisions would be directly affected by this legislation. Even those non-construction employers who serve only as general contractors or construction managers on their own projects, as many do, would be subject to the bill's provisions. Moreover, the many suppliers and distributors of construction products who install or perform services on construction sites could be enmeshed in "single employer" status with other employers.

The foregoing demonstrates a few of the ways in which non-construction employers would be directly impacted by S.492. In addition, employers in all industries would be adversely affected by the reduced competition and increased costs of construction services which would result from this bill. In these days of a global economy and world-wide competition for markets for domestically produced goods and services, eliminating competition and increasing costs will serve only to close these markets to American products and eliminate American jobs.

H.R.281, as modified, purports to address these concerns of non-construction employers. Section 2(a) of the House substitute begins, "Any two or more business entities engaged primarily in the building and construction industry . . . ." The underscored language is identical to that contained in Section 8(f) of the National Labor Relations Act. In his statement in support of the substitute, Rep. Clay stated that "this change is offered to clarify that the bill is not intended to reach non-construction employers . . . ." Unfortunately, this identical language has been interpreted over the years by the Board and Federal Courts as including employers which would not normally be considered to be "in the construction industry." The cases cited above provide ample proof that the mere addition of the word "primarily" to this definition does not limit its application in any significant respect.

Other language in the House substitute bill serves only to heighten the concern that non-construction employers could be affected by H.R.281. The new definition of "single employer" is dependent upon the scope of the various collective bargaining agreements applicable to a particular job site. The problem with this definition is that existing jurisdictional clauses in such contracts frequently contain overly broad definitions of the type of work which is covered. For example, the constitution of the Northern Georgia Building and Construction Trades Council describes those engaged in building and construction, and therefore those covered by contracts with the Council, as

> those engaged in fabrication, assembly, processing, or supplying building materials within the geographical jurisdiction of the Council . . . .

Obviously this definition would encompass many non-construction employers.

Under current law manufacturers, retailers, and other non-construction employers who have their own construction divisions currently are considered to be "engaged primarily in the building and construction industry" and therefore would continue to be directly affected by this legislation. Even those non-construction employers who serve only as general contractors or construction managers on their own projects, as many do, would remain subject to the bill's provisions. Moreover, the many suppliers and distributors of construction products who install or perform services on construction sites could be enmeshed in "single employer" status with other employers. See Indio Paint and Rug Center, 156 NLRB 951 (1966). Finally, of course, employers in all industries would be adversely affected by the reduced competition and increased costs of construction services which would result from this bill. In these days of a global economy and worldwide competition, eliminating competition and increasing costs will serve only to make American-made products non-competitive and eliminate American jobs.

SECTION 2(b) - Contract Application

Modification of Existing Contracts

Just as they argue for the companion bill, H.R.281, the proponents of S.492 argue, "It is the employer and the union who voluntarily set the boundaries of their agreement, and this bill merely enforces their agreement." This simplistic argument ignores not only the fact that this new definition "single employer" would apply throughout the National Labor Relations Act, but also the fact that the parties to pre-hire agreements also voluntarily decide which companies are to be covered by the agreement. Many unions successfully have sought to include subsidiaries and affiliates within the scope of pre-hire agreements. This bill, if passed, would inject Congress directly into the collective bargaining process and rewrite existing agreements in a way in which the parties never contemplated.

Although S.492 provides for a one-year delay before existing contracts must be applied to ongoing construction projects, this grace period does not eliminate the impropriety of modifying existing collective bargaining agreements to expand their application. As indicated above, these labor contracts were negotiated at a time when the construction unions were fully aware that the agreements did not apply to the open shop sides of double breasted employers. With this knowledge, the construction unions entered into agreements of a fixed duration. Although it is impossible to recreate the exact give and take of the collective bargaining process, the added factor of applying the contract to additional projects clearly would have affected the outcome of the negotiations. To grant construction unions this windfall during the term of existing agreements simply is not fair.

Denial of Open Shop Employees' Rights

S.492 also would force many open shop contractors under union contracts against their will and without their employees' consent. This would occur without even a single vote. The same result is true not only for the large double-breasted contractors which enter into nationwide agreements, but also for smaller companies which sign regional agreements. Indeed, the only double-breasted contractors which could avoid this result would be those which only sign "project agreements" limited to specific job sites.

The proponents of S.492 seek to diminish this denial of fundamental rights by arguing that under Section 8(f) of the Act a contractor may sign a pre-hire agreement without an employee vote. This argument ignores the fact that pre-hire agreements are voluntary arrangements *permitted* by Congress, and it ignores the policy reasons for allowing pre-hire agreements. The subordination of employee rights which accompanies a pre-hire agreement is permitted because, historically, voluntary pre-hire agreements were necessary in order to allow a contractor to estimate his future labor costs and to provide him with a ready source of skilled employees. Voluntary pre-hire agreements were viewed as contributing to stability and labor peace in the construction industry.

None of these policy considerations apply to open shop construction. Open shop contractors have a ready source of skilled employees, their own employees. Moreover, for better or worse, open shop contractors have decided that they do not need whatever predictability of labor costs that a pre-hire agreement might give them. Without the policy considerations underlying voluntary pre-hire agreements, there is no justification for ignoring the rights of open shop contractors and their employees by converting pre-hire agreements into compulsory arrangements required by Congress. Simply stated, voluntary arrangements encourage stability and labor peace; compulsory arrangements are disruptive and destabilizing.

The proponents of S.492 also argue that under Section 2(c) of the bill employees forced into union membership by Congressional fiat may seek to decertify the union after the fact. However, even the supporters of this bill acknowledge that elections often are not feasible in the construction industry. In addition, since Section 2(b) of the bill automatically extends union contracts to open shop employers and their employees, those employees, before being given the opportunity to have an election concerning these issues, would be required to join unions in most states and to go through hiring halls in all states in order to keep the jobs they already have. In many cases these employees effectively would be replaced by union members. These are facts which the proponents of S.492 do not deny. The building and construction trades unions are not supporting this legislation to protect open shop employees' rights; they are supporting it in order to take existing jobs away from open shop employees and give those jobs to current union members.

SECTION 2(c) - Pre-Hire Agreements
Voluntary or Compulsory

The proponents of S.492 initially argued that Section 2(c) of the bill, which is identical to the provision in the House substitute, merely required contractors to abide by the terms of pre-hire agreements which had voluntarily been signed. As set forth above, the Board's decision in Deklewa accomplishes this purpose. When faced with the fact that Section 2(c) of the bill has become moot, its proponents shifted to a new argument. They now argue that contractors should be compelled to continue to deal with construction unions after pre-hire agreements have expired without any demonstration that the unions represent their employees. Without any justification, this new interpretation of Section 2(c) of this bill would not only bind an employer for the specific period to which he agreed, it would bind him to the union perhaps in perpetuity. This would be contrary to the clear intention of Congress in 1959 that pre-hire agreements were to be voluntary relationships. Congress would be thrust into the collective bargaining process and pre-hire agreements would be converted from voluntary relationships permitted by Congress since 1959 into compulsory relationships required by Congress. The proponents of S.492 have identified no basis for such a radical change in public policy.

Certainly the balance struck by Deklewa is a fairer rule of law. Under Deklewa it is only where the union has not shown that it represents a contractor's employees that the contractor may cease dealing with the union after the pre-hire agreement has terminated. Of course, as in all industries, if a union demonstrates that it represents a majority of the contractor's employees, the contractor must continue to deal with the union, and if requested, bargain for a subsequent collective bargaining agreement.

PROBLEMS CREATED BY HOUSE SUBSTITUTE

As is set forth above, the substitute bill fails to address the two concerns to which it is directed and totally ignores several additional problems which are raised by H.R.281. In addition, however, the substitute creates even more problems. Specifically, the substitute would tie the definition of "single employer" to the existence of a collective bargaining agreement. Also, the correct interpretation of law would be dependent upon definitions and references contained in those collective bargaining agreements.

If the concept of "single employer" had no meaning outside the scope of H.R.281, these flaws might be less substantial. However, since so many rights and obligations flow from single employer status, these flaws are fatal. Under the substitute bill, contractors related through common ownership, management or control would be considered a single employer only if one of those contractors was signatory to a union contract. Thus, if none were signatory, each would retain their separate status and their protection against secondary boycotts. If even one of those contractors were to sign a union contract, all would immediately become bound and all would lose their protections against secondary boycotts. This would be true even if the other contractors did not have the power to prevent the one contractor from signing the union contract. This result is fundamentally unfair and illogical. No possible justification exists for a rule which would treat groups of contractors differently merely because one of the contractors became signatory to a union contract.

Moreover, and perhaps more disturbing, by conditioning the application and scope of law upon the terms of union contracts, Congress would be abdicating its responsibility to enact legislation and would grant organized labor carte blanche to shape the law as it deems appropriate.

While the substitute offered by Rep. Clay demonstrates that the original House bill was fatally flawed in several serious respects, the substitute is in many respects worse than the original bill. The original bill contained ambiguous language which could be subject to very broad interpretation; however, at least the language of the bill would not change after its enactment. In contrast, the House substitute incorporates language from thousands of differing collective bargaining agreements across the nation, both those existing and those yet to be negotiated. The language in these contracts is exceedingly broad and all-encompassing. In incorporating this language into H.R.281 the bill not only delegates Congress's legislative authority to private parties, but also provides an environment of uncertainty as to the bill's scope and application, providing fertile ground for future litigation.

The House proponents of this legislation claim that the substitute language eliminates the ambiguities contained in the original bill. In a way this is true. H.R.281, as modified, now clearly states that to determine the meaning of the legislation you must look to the language of the thousands of collective bargaining agreements across the country. What is unclear, and what the proponents of this legislation have made no attempt to ascertain, is how the language of these contracts will affect the application of the law. The House substitute leaves one with the impression that the language of these contracts is clear and mutually exclusive. However, a simple reference to the following clauses of two heavy industrial contracts in North Dakota will serve to disprove this unwarranted assumption. A recent Teamster heavy industrial contract for North Dakota describes the work covered as follows:

> This agreement shall cover the construction, addition, modification, alteration, or repair of all power plant projects; gassification plant projects, gasohol plant projects; and all other related energy projects; oil refinery projects; malting plant projects; cement plant projects (manufacturing), and government defense projects.

A recent Operating Engineers heavy industrial project defines its work covered as follows:

> This agreement shall cover the construction, addition, modification, alteration, or repair of all power plants, coal gasification plants, natural gas processing plants and oil refineries within the state of North Dakota.

These two contracts cover the exact same work but are with different trades. If two "related" contractors each were signatory to one of these contracts, H.R.281, as modified, would deem them a single employer and require each to abide by the contract of the other. The potential for conflict and litigation is obvious. A reference to the following language from a Cement Masons' contract in California also highlights this problem:

> Without limiting the scope of the work covered hereby, it is agreed that the Cement Masons' work shall include, but shall not be limited to, all of the following construction work:
>
> 1. All building construction, including but not limited to the construction, erection, alteration, repair, modification, demolition, addition or improvement in whole or in part of any building structure.
>
> 2. All heavy highway and engineering construction, including but not limited to the construction, improvement, modifications and demolition of all or part of any streets and highways (including sidewalks, curbs, and gutters), bridges, viaducts, railroads, tunnels, airports, water supply, irrigation, flood control and drainage systems, sewer and sanitation projects, wharves, docks, breakwaters or rip-rap stone, or operation incidental to such heavy construction work.

Obviously, this definition includes every type of construction work imaginable. The only thing which limits the application of this contract is the fact that current law confines this agreement to the employer that signed it, a cement contractor. If that employer were "related" to any other contractor, H.R.281

as modified would deem them a single employer and extend that contract to its work.

The end result is that the substitute replaces ambiguous language which would not change from year to year and would not change from area to area, with other ambiguous language which is constantly changing. In effect, H.R.281 would convert every jurisdictional dispute into a source of extended, costly litigation. In what is claimed to be an effort to stabilize the construction industry, H.R.281 would disrupt that industry at its foundation.

CONCLUSION

The National Coalition to Defeat S.492 has attempted to bring into the forum a number of genuine issues which were not addressed by the unions when this legislation was introduced. There is ample evidence to demonstrate that the fundamental premise of this bill, i.e., that the practice of double breasting is an evil abuse which must be stopped, is completely without foundation. Further it is quite clear that this loosely drawn legislation raises a host of serious problems which perhaps its authors did not envision. The proponents of S.492 claim that the Coalition has not addressed the merits of the bill itself. We disagree. We have addressed the merits straight on, and they have been found lacking.

In addition, the House substitute does not address and therefore does not alter in any way the Coalition's two fundamental objections to the bill: the elimination of double breasting and the forced expansion of pre-hire agreements beyond their terms. Further, the substitute does not remove the other problems created by the bill, including expanded picketing/secondary boycotts, the impact on non-construction employers, and tne denial of open shop workers' rights. In fact, the substitute creates new concerns.

(NOTE: In the interest of economy, the "Table of Cases" accompanying this statement was retained in the files of the Committee.)

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June 1, 1987

The Honorable Howard M. Metzenbaum
United States Senate
Washington, D.C. 20510

Dear Sen. Metzenbaum:

I am proud to submit this statement on behalf of the members of the Mechanical Contractors Association of America, Inc. (MCAA) in opposition to S.492, the Construction Industry Labor Law Amendments of 1987, or, as it is better known, anti-dual shop legislation.

MCAA is a construction trade association of approximately 1,300 firms employing roughly 125,000 persons. The work of a mechanical contractor is used to move fluids -- both liquids and gasses. This includes the fabrication and installation of heating, ventilating, air conditioning and process piping systems, and further encompasses service, maintenance and the testing, adjusting and balancing of these systems. Our work effects multi-residential, commercial, public and industrial facilities. MCAA members are union-employing contractors.

S.492 would force a union-employing contractor to choose whether to operate exclusively union or exclusively non-union. Should this legislation pass, according to our analysis, union-employing mechanical contractors, who are already declining in number, would simply stop signing new labor agreements and even more construction work would go to the non-union sector. This would be particularly true in those areas of the country where union general contractors are sparse or nonexistent.

But ours is not the only industry that would suffer if this legislation is passed. It is the belief of many informed parties that this legislation will ultimately reduce competition in the industry. The resulting increased cost of construction will then be passed on to U.S. manufacturers and, eventually, to the public. The situation grows even darker when we consider the possibility of common situs picketing and the elevation in the status of pre-hire agreements to the equivalent of collective bargaining agreements that S.492 proposes.

Although MCAA has developed strong cooperative programs with labor and continues to provide many services and benefits that keep the union-employing mechanical contractor competitive in today's world, MCAA stands in strong opposition to this legislation. Its passage would be detrimental to both the union contractors and the construction unions who are supporting it. We believe that, in the final analysis, the biggest loosers would be the construction unions themselves.

In conclusion, the members of MCAA join with others in the construction industry in urging the Senate Labor Subcommittee to defeat S.492. Attached are copies of a letters sent by MCAA members to their congressional representatives voicing their opposition to S.492.

Sincerely,

Charles H. Carlson
MCAA President

Enclosures

cc: Sen. Matsunaga
Sen. Harkin
Sen. Mikulski
Sen. Quayle
Sen. Humphrey
Sen. Stafford
Sen. Hatch

Mechanical Contractors Association of America, Inc.

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Treasurer
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P O BOX 4067
ALBANY NY 12204
(518) 465-3426

May 8, 1987

Sen. Daniel Patrick Moynihan
Senate Office Building
Washington, D. C. 20510

Dear Senator Moynihan:

"Orchides forum trahite, cordes et mentes veniat" seems to be the essential philosophy behind H.281/S.492, the "anti-double breasting" bill. As a Union only contractor, I strongly support Union Construction. However, this Machiavellian approach to stopping the practice of double breasting will do more to hurt Union construction than anything I can imagine.

At a recent meeting of the Business Roundtable, a spokesman from Dupont stated that if this legislation should pass, Dupont would no longer entertain bids from Union contractors. In my subsequent follow up, I have found numerous other major U. S. construction users have come to the same conclusion.

If we are serious about reducing the trade deficit, S.492 must be defeated. Union only, or open shop only, result in higher costs of construction. Human nature rarely changes. Giving any one segment of the construction industry a position of exclusivity will result in higher costs. Higher construction costs result in higher product costs for U.S. manufacturers.

This is bad legislation. Remember, I am a Union Employing contractor. Passage of this bill will hurt me. I sincerely believe, long term, it will reduce employment opportunities for Union employing contractors.

Respectfully yours

Donald A. McKay

Donald A. McKay
Albany, N. Y.

DAM:ew

Subsidiaries include: National Certified Pipe Welding Bureau, National Mechanical Equipment Service and Maintenance Bureau and National Environmental Balancing Bureau.

METROPOLITAN DETROIT
PLUMBING & MECHANICAL CONTRACTORS ASSOCIATION

14801 W. EIGHT MILE ROAD • DETROIT, MICHIGAN 48236 • PHONE (313) 341-765

May 11, 1987

The Honorable Donald W. Riegle
105 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Riegle:

The Metropolitan Detroit Plumbing and Mechanical Contractors Association, along with other subcontractors associations in Michigan, who employ about 5,000 Union Plumbers, Pipefitters, Electricians and Sheet Metal Workers support the following positions of the National Associated Speciality Contractors who:

1. Oppose legislation which whould prohibit construction industry employers from operating both union and non-union subsidiaries because it ignores the reality of market place competition. Protectionism from competition either at home or abroad is ultimately suicidal, both for industries and nations. Not only is it increasingly impossible to insulate any industry, such as construction, or any country, from all forms of competition, but such protection invariably promotes still more waste and inefficiency, and invites even tougher competition. Non union construction is on the rise. The only way union employing contractors and the unions they employ from can survive is to be cost competitive and productive. Both H.R. 281 and S. 492 are a fatal step in the wrong direction. (See attached article.)

2. Support the Prompt Payment Act, S.328 and H.R.1663. In 1982, Congress passed the Prompt Payment Act to ensure that government would pay its contractors on time. The Act imposed time limits upon the government for making payments and assessed late payment interest penalties when it failed to meet these deadlines.

   The Prompt Payment Act of 1987 would take that legislation one step further by requiring government construction contractors to include prompt payment provisions in their subcontracts and purchase orders in accordance with prevailing industry standards. It would also require the payment of late payment interest when these provisions are not met. Specific support is urged for Section 7 which provides flow-through of prompt payment benefits to subcontractors. Subcontractors on government projects also have businesses to run and payrolls to meet. The cycle does not stop with the prime contractor.

These subcontractors do fabrication, new construction installation, service and maintenance. Their work covers multi-residential,commercial, public and industrial facilities. About one-half perform Federal contract work - most as subcontractors. They can not pay wages and fringes to their 5,000 union tradesmen if the prime contractor does not promptly pay them once they have recieved the money from the Federal Government.

Hopefully, you will decide to oppose Anti-Double Breasting and support Prompt Payments, with Section 7 included.

Respectfully,

METROPOLITAN DETROIT PLUMBING &
MECHANICAL CONTRACTORS ASSOCIATION

Gus J Dowels

Gus J. Dowels
Assoc. Managing Director

GJD/jfl

VOEGELE
MECHANICAL

June 1, 1987

The Honorable Curt Weldon
House of Representatives
Washington, DC 20515

Dear Mr. Weldon:

We are a construction company in the City of Philadelphia and feel this would be an undue restraint upon our business and limit our ability to grow in our industry.

I am writing to voice my opposition to legislative initiatives H.R.281/S.492, the Construction Industry Labor Law Amendments of 1987, or, as it they are better known, anti-dual shop legislation.

H.R.281/S.492 would force a union-employing contractor to choose whether to operate exclusively union or exclusively non-union. Should this legislation pass, union-employing mechanical contractors, who are already declining in number, would simply stop signing new labor agreements and even more construction work would go to the non-union sector. The biggest losers would be the construction union themselves.

But ours is not the only industry that would suffer if this legislation is passed. It is the belief of many informed parties that this legislation will ultimately reduce competition in the industry. The resulting increased cost of construction will then be passed on to U.S. manufacturers and, eventually, to the public. The situation grows even darker when we consider the possibility of common situs picketing and the elevation in the status of pre-hire agreements to the equivalent of collective bargaining agreements that H.R.281/S.492 propose.

If passed, H.R.281/S.492 would destabilize construction industry labor relations and existing collective bargaining relationships while denying contractors--both open-shop and union-employing contractors--the flexibility to invest and compete in response to market demands. I strongly urge you to oppose H.R.281/S.492.

Sincerely,

VOEGELE MECHANICAL INC.

George A. Voegele, President

GAV/ph

VOEGELE MECHANICAL, INC. • 1515 FOULKROD STREET • PHILADELPHIA, PA 19124 • (215) 743-2283